CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904.~~ 1905.

No. ~~627~~. 240.

JOHN W. BALLMANN, APPELLANT,

vs.

VIVIAN J. FAGIN, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF OHIO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED APRIL 24, 1905.

(19,727.)

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INDEX.

	Original.	Print.
Caption	1	1
Petition for writ of *habeas corpus*	1	1
Order to issue writ of *habeas corpus*, &c	4	3
Writ of *habeas corpus*	5	4
Recognizance	6	4
Certified copy of order and marshal's return	8	5
Marshal's return of writ of *habeas corpus*	9	6
Answer	10	7
Exhibit—Transcript of proceedings in district court	15	10
Caption	15	10
Complaint of grand jury	15	10
Order to produce books, &c	16	11
Charges of contempt	17	11
Finding of contempt, &c	18	12
Order of commitment	19	13
Clerk's certificate	20	13

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	Original.	Print
Reply	21	14
Transcript of proceedings in district court	28	17
Caption	28	18
Complaint of grand jury	28	18
Order to produce books	30	19
Charges of contempt	30	19
Findings of contempt	32	20
Order to give bond	33	20
Recognizance	33	21
Report of grand jury	34	22
Answer of Ballmann	35	22
Copy of petition in Hamilton county court of common pleas	35	23
Order of commitment	38	24
Writ of final commitment	38	24
Order allowing bill of exceptions	39	25
Bill of exceptions	40	25
Colloquy between court and counsel	40	25
Testimony of George F. Dieterle	42	26
Thomas J. Clements	44	28
Frank M. Kramer	52	33
Elmer S. Hunt	61	38
George F. Dieterle (recalled)	65	40
Motion to discharge, &c	66	41
Judge's certificate	69	42
Exhibit F—Subpœna	69	43
G—Refusal to answer	69	43
H—Account	70	44
I—Account	71	44
Certificate of Judge Thompson	73	46
Exhibit No. 1—Report of grand jury	73	46
2—Answer of Ballmann	74	46
3—Petition in Oppenheimer case	74	47
Clerk's certificate	76	48
Hearing and submission	77	48
Order dismissing petition and remanding petitioner	77	49
Petition for appeal	78	49
Assignment of errors	78	49
Order allowing appeal, &c	79	50
Recognizance	80	50
Clerk's certificate	81	51
Citation and service	82	51

1 THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, } ss:

At a stated term of the circuit court of the United States of America, within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court rooms at the city of Cincinnati, Ohio, in said district, on the first Tuesday of April being also the fourth day of that month, in the year of our Lord, one thousand nine hundred and five and of the American Independence, the one hundred and twenty-ninth:

Present: The Honorable Horace H. Lurton, judge.

Among the proceedings had were the following, to-wit:

In the Matter of JOHN W. BALLMAN. *Habeas Corpus.*

Be it remembered, that heretofore, to-wit: on the 10th day of April, in the year of our Lord one thousand nine hundred and five, there was filed in the clerk's office a petition for writ of *habeas corpus*, which was clothed in the words and figures following, to-wit:

Petition for Writ of *Habeas Corpus.*

In the Matter of JOHN W. BALLMANN.

The petitioner, John W. Ballmann shows to the court:

That on April 7th, 1905, he was served with a subpoena to appear before the grand jury of the district court of the United States for the southern district of Ohio, western division, to give testimony in a certain matter then under investigation and pending before
2 said grand jury, and was ordered by said subpœna to produce any cash book, ledger, letter press copy books, and all sheets showing transactions under the name of A. Smith and A. Johnson during the months of December, 1904, and January and February, 1905. In obedience to said subpœna your petitioner did appear before said grand jury, and being duly sworn, testified that he did not have any of the books or papers called for by said subpœna in his possession or under his control.

On April 8, 1905, said grand jury represented to said district court that your petitioner had wilfully failed and refused to produce a cash book required to be produced by said subpœna, and also that your petitioner had refused to answer the following questions propounded by said grand jury:

"(*a.*) State what on account No. 140 sheet No. 1, on this big ledger now in use in your business, these figures under the word 'folio,' on the debit side of the account, to-wit: No. 349, 349, 349, 349, 349, and 351 refer to.

(*b.*) Do not these figures 349, in your handwriting, on account No. 140, refer to the folios in your cash book in use in your business in January, 1905?"

And said grand jury represented that your petitioner was in contempt of court.

Thereupon said court on April 3, 1905, entered the following order:

"The charges of contempt presented by the grand jury upon the eighth day of April, 1905, came on to be heard upon the evidence and the argument of counsel, and after due consideration the court finds that the said John W. Ballman is guilty of contempt of the process and orders of this court, as charged in said information filed by said grand jury, in the following particulars, to-wit:

First. That the said John W. Ballman has knowingly failed and refused to produce to and before said grand jury a certain cash book used by him in the conduct of his business, and which said cash book is in his possession or under his control.

Second. That the said John W. Ballman has wilfully refused to answer before said grand jury certain questions material to an examination pending before said grand jury, with reference to said cash book, as is specifically charged in the information filed against him.

Wherefore, it is considered, ordered and adjudged by the court that said John W. Ballman produce the said cash book and answer the questions set out in said charges of contempt at twelve o'clock noon, Monday, April tenth, 1905, before said grand jury, and
3 in default thereof that he be committed to and confined within the jail of Miami county, at Troy, Ohio, until he complies with the order of this court, or is discharged by due process of law."

In pursuance of said last mentioned order your petitioner appeared before the grand jury and made the following answer:

"I have not now, and neither at the time of nor at any time since the service of the first subpœna upon me in this matter have I had in my possession or under my custody or control the book referred to in the order of the court entered on April 8, 1905, or any book showing transactions under the name of A. Smith or A. Johnson, and am unable to produce the same.

I decline to answer the questions contained in said order of April 8, 1905, on the ground that it might tend to criminate me, and in this connection I produce a copy of a petition filed against me and others by Emanuel Oppenheimer in the court of common pleas of Hamilton county, being case No. 126824, and I state that there are many other actions of the same kind pending against me."

The grand jury reported said answer to the court, and thereupon the court entered an order committing your petitioner to the custody of Vivian J. Fagin, marshal of this court, to be taken to and confined in the jail of Miami county, at Troy, Ohio, until your petitioner complies with said order of April 8, 1905.

Your petitioner states that said order of April 8, 1905, was made without any lawful evidence that your petitioner had the cash book therein referred to in his possession or under his control, and is illegal and void and beyond the jurisdiction of said court, and that said order committing your petitioner is illegal and void and beyond the jurisdiction of said court and in contravention of the fourth amendment and the fifth amendment of the Constitution of the United States, and your petitioner is held in custody and deprived of his liberty in violation of said provisions of the Constitution of the United States.

Wherefore your petitioner prays that a writ of *habeas corpus* may issue from this honorable court directed to the said Vivian J. Fagin, United States marshal as aforesaid, and that the cause of said
4 detention and restraint be inquired into, and upon the hearing of said cause your petitioner may be released and discharged from said unlawful custody and imprisonment and restored to his liberty.

JOHN W. BALLMANN.

STATE OF OHIO, }
Hamilton County, } *ss:*

John W. Ballman, being first duly sworn, makes oath and says that the facts and statements contained in his foregoing petition are true as he believes.

JOHN W. BALLMANN.

Sworn to before me and subscribed in my presence this 10th day of April, 1905.

BEN B. NELSON,
[SEAL.] Notary Public, Hamilton County, Ohio

And afterwards, to-wit: on the 10th day of April, A. D. 1905, an entry was made upon the journal of said court clothed in the words and figures following, to-wit:

Entry, Journal 8, Page 32.

This day came John W. Ballman and presented his petition for a writ of *habeas corpus;* on consideration whereof, it is ordered by the court that a writ issue as prayed, returnable on April 12, 1905, at 9:30 o'clock a. m. and that the petitioner be admitted to bail in the sum of $5000 to answer the order of this court.

And thereupon there was issued out of the clerk's office of said court our certain writ of *habeas corpus* in this cause directed to the marshal of said district and against the said defendant, which
5 said writ is clothed in the words and figures following to-wit:

Writ of *Habeas Corpus.*

UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio.

To Vivian J. Fagin, United States marshal of the southern district of Ohio:

We command you that the body of John W. Ballmann, in your custody detained, as it is said, together with the day and cause of his caption and detention, you safely have before Hon. Horace H. Lurton, judge of our circuit court of the United States, within and for the division and district aforesaid at the court rooms in the city of Cincinnati, Ohio, at 9:30 o'clock a. m. April 12th, 1905, to do and receive all and singular those things which the said Hon. Horace H. Lurton judge of our said circuit court, shall then and there consider of him in this behalf; and have you then and there this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States of America, this tenth day of April, A. D. 1905.

Attest:

[SEAL.]

B. R. COWEN, Clerk,
By ROBERT C. GEORGI, Deputy.

And afterwards, to-wit: on the 10th day of April A. D. 1905, a recognizance was filed in the clerk's office of said court clothed in the words and figures following, to-wit:

Recognizance for Appearance Before said Court.

6 THE UNITED STATES OF AMERICA,
Southern District of Ohio, *ss:*

Be it remembered, that on the tenth day of April A. D. 1905, before me, Benjamin R. Cowen, clerk of the United States circuit court, within and for the district aforesaid, duly appointed as such by the said court personally came John W. Ballman, as principal and George H. Yeager and Robert J. O'Brien as sureties, and jointly and severally acknowledged themselves to owe to the United States of America in the sum of five thousand dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to-wit:

The condition of this recognizance is such, that if the said John W. Ballman shall personally appear before the circuit court of the United States, in and for the district aforesaid, at Cincinnati, Ohio, on the 12th day of April A. D. 1905, at 9:30 o'clock a. m. and then and there abide the further order of said court, and not depart with-

out leave thereof; then this recognizance to be void; otherwise to remain in full force and virtue.

JOHN W. BALLMANN. [SEAL.]
GEORGE H. YEAGER. [SEAL.]
ROBERT J. O'BRIEN. [SEAL.]

Taken and acknowledged before me on the day and year first above written.

B. R. COWEN,
[SEAL.] Clerk U. S. Circuit Court, Southern District of Ohio,
By ROBERT C. GEORGI, Deputy.

7 UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, }

I, George H. Yearger, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth ten thousand dollars in real estate in my own name, situate in the county of Hamilton in said district.

GEORGE H. YEAGER.

Sworn to before me the tenth day of April 1905.

ROBERT C. GEORGI, Deputy,
[SEAL.] Clerk U. S. Circuit Court, S. D. O.

SOUTHERN DISTRICT OF OHIO, ss:

I Robert J. O'Brien one of the sureties above named, do solemnly swear that after paying my just debts and liabilities, I am worth ten thousand dollars in real estate in my own name, situate in the county of Hamilton in said district.

ROBERT J. O'BRIEN.

Sworn to before me the tenth day of April 1905.

ROBERT C. GEORGI,
[SEAL.] Deputy Clerk U. S. Circuit Court, S. D. O.

And afterwards, to-wit: but on the same day a certified copy of the order herein was delivered to the marshal of the southern district of Ohio, which said order is clothed in the words and figures following, to-wit:

8 THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Western Division, }

At a stated term of the circuit court of the United States of America, within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America,

begun and had in the court rooms at the city of Cincinnati, Ohio, in said district, on the first Tuesday of April being also the fourth day of that month, in the year of our Lord, one thousand nine hundred and five, and of the American Independence, the one hundred and twenty-ninth.

Present: The Honorable Horace H. Lurton, judge.

On Monday the 10th day of April A. D. 1905. Among the proceedings had were the following, to-wit:

In re JOHN W. BALLMAN, *Ex Parte.* 6007.

This day came John W. Ballman and presented his petition for a writ of *habeas corpus;* on consideration whereof, it is ordered by the court that a writ issue as prayed returnable on April 12, 1905, at 9.30 o'clock a. m. and that the petitioner be admitted to bail in the sum of $5,000 to answer the order of the court.

9 THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, } ss:

I, Benjamin R. Cowen, clerk of the circuit court of the United States of America, within and for the district and division aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court at the city of Cincinnati Ohio, this 10th day of April A. D. 1905.

[SEAL.]

B. R. COWEN, Clerk.
By ROBERT C. GEORGI,
Deputy Clerk.

And afterwards, to-wit: on the 10th day of April A. D. 1905. came the marshal of said district to whom said order was in form directed and returned the same into the clerk's office of the court aforesaid with his proceedings endorsed thereon, clothed in the words and figures following, to-wit:

Marshal's Return.

APRIL 10TH, 1905.

Received this order of court at Cincinnati, O. on April 10th, 1905 Pursuant to this order of court within named John W. Ballman, was released from custody on this date upon filing a sufficient bond, with the clerk as herein provided.

V. J. FAGIN, Marshal.

Fee 50.

And afterwards, to-wit: on the 12th day of April A. D. 1905 came the marshal to whom said writ of *habeas corpus* was in form directed and returned the same into the clerk's office of said court with his proceedings endorsed thereon, clothed in the words and figures following, to-wit:

CINCINNATI, O., April 12, 1905—9:30 a. m.

Received this writ at Cincinnati, Ohio, on the 10th day of April 1905, and pursuant to mandate contained therein, I have the body of the within named John W. Ballman now before the Honor-
10 able Horace H. Lurton, judge of the circuit court of the United States, western division, southern district of Ohio, at Cincinnati.

V. J. FAGIN,
U. S. Marshal, S. D. O.

Fees.

1 service $2.00

And afterwards, to-wit: on the 12th day of April A. D. 1905. an answer was filed in the clerk's office of said court clothed in the words and figures to-wit:

Answer.

In the Matter of JOHN W. BALLMAN.

Answer.

Now comes Vivian J. Fagin, United States marshal for the southern district of Ohio, and produces in open court the body of John W. Ballmann by virtue of and in accordance with the order of this court made on April 10th, 1905.

The said Vivian J. Fagin, marshal as aforesaid, by way of return and as answer, and for the purpose of showing the true cause of the detention of the said John W. Ballman, says as follows:—

That in obedience to a certain subpœna issued for said John W. Ballman on the seventh day of April, 1905, to appear before the grand jury for that term then in session, and which said subpœna required the said John W. Ballman to produce a cash book, ledger, letter press copy books and all sheets showing transactions under the name of A. Smith and A. Johnson during months of December, 1904, and January and February, 1905, appeared before said grand jury upon the seventh day of April, 1905, and gave certain testimony, but the said John W. Ballmann failed and refused to pro-
duce a certain book known as a cash book, and employed by
11 him in the conduct of his business.

That thereupon the grand jury in writing, on said day, informed the Honorable A. C. Thompson, judge of the United States district court, of the said refusal of said John W. Ballman to pro-

duce said book, which book was then and there material to an investigation then pending before said grand jury into an alleged violation of the United States banking laws.

That thereupon said John W. Ballmann voluntarily appeared in open court, and also by his counsel, and in open court the court made order that the said John W. Ballman forthwith produce all books and papers pertaining to the business in which he is engaged, whether as an employer or manager or proprietor, and all books and papers within his control.

That the said John W. Ballmann on the eighth day of April, 1905, appeared as a witness before said grand jury and failed and refused to produce a certain cash book, and employed in the conduct of his business, which said book was material to the investigation aforesaid, and which said book was included in the order of the court made on April 7th.

And the said John W. Ballmann being present before said grand jury then and there refused to answer certain questions propounded to him, and which were material to said investigation, which said questions are as follows:

(*a.*) State what on account No. 140, sheet No. 1, on this big ledger now in use in your business, these figures under the word "folio," on the debit side of the account, to-wit: 349, 349, 349, 349, 349, and 351, refer to?

12 (*b.*) Do not these figures 349, in your handwriting, on account No. 140, refer to the folios in your cash book in use in your business in January, 1905?

And thereupon the said grand jury preferred charges of contempt, in writing, against said John W. Ballmann and filed the same in said district court, for that he had refused to produce said book and had refused and declined to answer said questions.

And thereupon the said John W. Ballman voluntarily appeared in open court, in person and by counsel, and the court proceeded to hear the said charges and the evidence of the witnesses following, to-wit: George F. Dieterle, foreman of the grand jury; Thomas J. Clements; Elmer E. Hunt, and Frank Kramer, and other evidence and a certain ledger of said John W. Ballman was offered in evidence and submitted to the court bearing upon said charges.

And thereupon, and after due consideration, the court rendered judgment, finding that the said John W. Ballman, is guilty of contempt of the process and orders of this court, as charged in said information filed by said grand jury, in the following particulars, to-wit:

First. That said John W. Ballman has knowingly failed and refused to produce to and before said grand jury a certain cash book used by him in the conduct of his business, and which said book is in his possession or under his control.

Second. That the said John W. Ballman has wilfully refused to answer before said grand jury certain questions material to an examination pending before said grand jury, with reference to said cash

book, as is specifically charged in the information filed against him.

13 And it was thereupon ordered and adjudged by the court "that said John W. Ballman produce the cash book and answer the questions set out in said charges of contempt, at twelve o'clock noon, Monday, April 10th, 1905, before said grand jury, and in default thereof that he be committed and confined within the jail of Miami county, at Troy, Ohio, until he complies with the order of this court or is discharged by due process of law."

That on the 10th day of April, 1905, said John W. Ballman appeared before said grand jury but failed and refused to produce the said cash book and declined to answer the said questions, as more fully appears by the report of said proceedings filed in said district court by said grand jury.

And thereupon the court ordered that said John W. Ballman, "be taken into custody by the marshal and that he be confined and imprisoned within the jail of the county of Miami, at Troy, Ohio, in accordance with the former order of this court."

And thereupon, on said 10th day of April, 1905, the said court issued to Vivian J. Fagin, marshal as aforesaid, its committment, in words and figures following, to-wit:

District Court of the United States, Southern District of Ohio, Western Division.

In the Matter of JOHN W. BALLMAN. For Contempt.

The defendant John W. Ballman having been tried and found guilty for contempt of court.

Thereupon the court pronounced the following sentence, to-wit:

14 That the said John W. Ballman be imprisoned in the jail of Miami county, Ohio, until he answers the questions and produces the book as he was required.

This, therefore, is to command the marshal of said district to take the body of the said John W. Ballman and commit the same to the said jail of Miami county pursuant to the above sentence.

[SEAL.] Witness, the Honorable Albert C. Thompson, judge of the district court of the United States, this tenth day of April, A. D. 1905, and in the 129th year of the Independence of the United States of America.

Attest: B. R. COWEN,
Clerk of the United States District Court, S. D. O.,
By ROBERT C. GEORGI, Deputy."

And all the said proceedings and orders appear by the records of said district court, a certified copy of which is hereto attached.

STATE OF OHIO, Hamilton County, } ss:

Vivian J. Fagin, United States marshal for the southern district of Ohio, being first duly sworn, says that the facts and allegations above contained are true as he verily believes.

VIVIAN J. FAGIN,
U. S. Marshal, S. D. O.

Sworn to before me and subscribed in my presence this 11th day of April, A. D. 1905.

ROBERT C. GEORGI,
[SEAL.] Deputy Clerk, U. S. District Court, S. D. O.

15 THE UNITED STATES OF AMERICA, Southern District of Ohio, Western Division, } ss:

At a stated term of the district court of the United States of America, within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court room, at the city of Cincinnati, Ohio, in said district, on the first Tuesday of April being also the fourth day of that month, in the year of our Lord, one thousand nine hundred and five and of the American Independence, the one hundred and twenty-ninth.

Present: The Honorable Albert C. Thompson, judge.

Among the proceedings had were the following, to-wit:

In the Matter of JOHN W. BALLMAN. In Contempt.

Be it remembered, that heretofore, to-wit: on the 7th day of April in the year of our Lord one thousand nine hundred and five, came the grand jury and filed in the clerk's office of said court aforesaid, their certain complaint of contempt, clothed in the words and figures following to-wit:

Complaint of Grand Jury.

CINCINNATI, OHIO, April 7th, 1905.

To the Honorable A. C. Thompson, judge of the U. S. district court for the southern district of Ohio.

SIR: The grand jury for the April term (1905) respectfully represents to your honor and charges that John W. Ballman, is
16 guilty of contempt of court in this, to-wit: That upon the 7th day of April, A. D. 1905, a subpœna in due form was served upon said John W. Ballman, commanding him to appear forthwith before this court and said grand jury, to give testimony

concerning a certain matter then under investigation before said grand jury, and to produce at said time and place the cash books, ledgers, letters press copy books and sheets showing the transactions as conducted under the names of A. Smith and A. Johnson with said John W. Ballman, during the months of December, 1904, and January and February, 1905.

Said John W. Ballman appeared before said grand jury in obedience to said subpœna, but failed, and still fails and refuses to produce before said grand jury the aforesaid books and papers.

The said papers and books are material to an investigation being conducted before said grand jury.

Respectfully submitted,

GEORGE F. DIETERLE, Foreman.

And afterwards, to-wit: on the 7th day of April A. D. 1905 an entry was made upon the journal of said court, clothed in the words and figures following, to-wit:

Journal 9, Page 47.

This day came the grand jury for the April (1905) term and presented its charges of contempt of court against John W. Ballman, in writing signed by the foreman of said grand jury.

Thereupon came into open court the said John W. Ballman, in person and by his counsel, and thereupon the court ordered
17 and directed said John W. Ballman forthwith to produce all books and papers pertaining to the business in which he is engaged, whether as an employer or manager or proprietor—the business with which he is connected—all books and papers within his control.

It is now directed that the above order be entered upon the journals of this court as of April 7, 1905.

And afterwards, to-wit: on the 8th day of April A. D. 1905 the following charges of contempt were filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Charges of Contempt by Grand Jury.

In the Matter of JOHN W. BALLMAN, in Contempt of Court.

To the Honorable A. C. Thompson, judge of the district court, S. D. O.:

The grand jury for the April term (1905) respectfully represents to your honor and charges that John W. Ballman is guilty of contempt of court in this, that

Whereas on the seventh day of April A. D. 1905, said Ballman was duly served with subpœna to appear before this court and this

grand jury, to give testimony in a certain matter then under investigation and pending before said grand jury, and being required by said subpœna to produce a certain cash book in use in his business, did on the seventh day of April and also upon the eighth day of April, 1905, being still under the process of this court, and
18 in contempt of the order of this court, and for the purpose of interfering with the due administration of justice of said court and in said grand jury investigation, wilfully failed and refused to produce said cash book.

2nd. That the said John W. Ballman, on the eighth day of April, 1905, while giving certain testimony before the said grand jury while under process of this court so to do, willfully and knowingly refused to answer certain questions pertaining to said investigation and material thereto, which said questions are as follows:—

(*a.*) State what on account No. 140 sheet No. 1, on this big ledger now in use in your business, these figures under the word, "folio," on the debit side of the account, to-wit: No. 349, 349, 349, 349, 349, and 351 refer to?

(*b.*) Do not these figures 349, in your handwriting, on account No. 140, refer to the folios in your cash book in use in your business in January, 1905?

Wherefore said grand jury charges that said John W. Ballman is in contempt of court, and asks that such proceedings may be had as in the premises are in accordance with the law.

GEORGE F. DIETERLE, *Foreman.*

And afterwards, to-wit: on the 8th day of April A. D. 1905, an entry was made upon the journal of said court, clothed in the words and figures following:—to-wit:

Entry Journal 9, Page 49.

The charges of contempt presented by the grand jury upon the eighth day of April 1905, came on to be heard upon the evidence and the arguments of counsel, and after due consideration the
19 court finds that the said John W. Ballman is guilty of contempt of the process and orders of this court, as charged in said information filed by said grand jury, in the following particulars, to-wit:—

First. That said John W. Ballman has knowingly failed and refused to produce to and before said grand jury a certain cash book used by him in the conduct of his business, and which said cash book is in his possession or under his control.

Second. That the said John W. Ballman has wilfully refused to answer before said grand jury certain questions material to an examination pending before said grand jury, with reference to said cash book, as is specifically charged in the information filed against him.

Wherefore, it is considered, ordered and adjudged by the court that said John W. Ballman produce the said cash book and answer the questions set out in said charges of contempt at twelve o'clock noon, Monday April 10th, 1905, before said grand jury, and in default thereof that he be committed to and confined within the jail of Miami county, at Troy, Ohio, until he complies with the order of this court, or is discharged by due process of law.

And afterwards, to-wit: on the 10th day of April A. D. 1905, an entry was made upon the journal of said court clothed in the words and figures, following:

Entry Journal 9, Page —.

The court having heretofore ordered that John W. Ballman appear before the grand jury for the April term (1905) and produce
20 before said grand jury a cash book referred to in the order of the court, and to answer the questions propounded by the grand jury, as set out in its charges heretofore filed, and it appearing that the said John W. Ballman had failed and refused to produce said book and had declined to answer said questions, it is now ordered that the said John W. Ballman be taken into custody by the marshal, and that he be confined and imprisoned within the jail of the county of Miami, at Troy, Ohio, in accordance with the former order of this court.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division. }

I, Benjamin R. Cowen, clerk of the district court of the United States, within and for the district and division aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above entitled cause as the same appears of record and on file in said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Cincinnati, Ohio, this 11th day of April A. D. 1905.

[SEAL.]

B. R. COWEN, Clerk,
By ROBERT C. GEORGI,
Deputy Clerk.

21 And afterwards, to-wit: on the 12th day of April A. D. 1905 a reply was filed in the clerk's office of said court clothed in the words and figures following, to-wit:

Reply.

In re JOHN W. BALLMAN. No. 6007.

Reply.

For reply to the answer of Vivian J. Fagin, marshal:

Your petitioner denies that said subpœna issued on April 7, 1905, required of him to produce any books or papers except those showing transactions under the name of A. Smith or A. Johnson during the months of December, 1904, and January and February, 1905; that in obedience to said subpœna, he appeared before said grand jury and testified that:

"There was no such book to his knowledge."

The following is a copy of said subpœna:

"THE UNITED STATES OF AMERICA, Southern District of Ohio, Western Division, } ss:

The President of the United States of America to John W. Ballman, Greeting:

We command and strictly enjoin you, that laying aside all manner of business and excuses whatsoever, you be and appear in your proper person before the judge of the district court of the United States for the southern district of Ohio, at Cincinnati forthwith, and also that you bring with you and produce at the time and place aforesaid, cash book, ledger, letter press copy book, and all sheets showing transactions under the name of A. Smith and A. Johnson during the months of December 1904, and January and February, 1905, and give testimony on behalf of the United States then and there what you and each of you may know before the grand jury and the truth to say on such matters as may then and there be required and not to depart without the leave of the court of the district attorney, and this you do under the penalty of the law.

22 Witness *that* A. C. Thompson, district judge of the United States this 7th day of April A. D. 1905, and in the 129th year of the Independence of the United States of America.

Attest:—

B. R. COWEN, Clerk,

[L. S.] By ROBERT C. GEORGI, Deputy."

Your petitioner submits that said order entered by said court requiring your petitioner to produce all books and papers pertaining to the business in which he is engaged, whether as an employer, or manager, or proprietor, and all books and papers within his control, is null and void, and beyond the power and jurisdiction of said court, being in contravention of the Constitu-

tion and laws of the United States, and especially of the fourth and fifth amendments of said Constitution.

He denies that on the eighth day of April, he refused to produce before said grand jury any book included in the order of the court made on April seventh.

He says that he was not charged in any of said proceedings with contempt for having refused to produce any book other than the books specified in said subpœna issued April 7, 1905, and that any orders of the court committing him for contempt, for failing to produce any other books are without process of law, and null and void

He says that the charges of contempt preferred by the grand jury on April 8, 1905, were on the ground that he had failed to produce a book called for by said subpœna issued April 7, 1905, and that said order entered by the court upon said charges was made without any evidence that your petitioner had a cash book or
23 other book in his possession or under his control "showing transactions under the name of A. Smith or A. Johnson," and is illegal and void and without due process of law and beyond the jurisdiction of said court.

In compliance with said order entered April 8, your petitioner appeared before the grand jury on April 10, 1905, and made the following answers under oath:

"I have not now, and neither at the time of nor at any time since the service of the first subpœna upon me in this matter have I had in my possession or under my custody or control the book referred to in the order of the court entered on April 8, 1905, or any book showing transactions under the name of A. Smith or A. Johnson, and am unable to produce the same.

I decline to answer the questions contained in said order of April 8, 1905, on the ground that it might tend to criminate me, and in this connection I produce a copy of a petition filed against me and others by Emanuel Oppenheimer in the court of common pleas of Hamilton county, being case No. 126,824, and I state that there are many other actions of the same kind pending against me."

The following is a copy of the petition filed by Emanuel Oppenheimer in the court of common pleas of Hamilton county, Ohio, submitted to the grand jury, and referred to in said answers of your petitioner to said grand jury:

24 Court of Common Pleas, Hamilton County, Ohio.

EMANUEL OPPENHEIMER, Plaintiff,
vs.
THE O'DELL COMPANY, a Corporation Organized under the Laws of Ohio; William J. O'Dell, George H. Stapley, John M. Gorman, William C. Dudley, L. W. Foster, John W. Balman, Thomas F. Shay, Wm. W. Douglas, C. J. O'Dell, Mabel A. Stapley, and Louise O'Dell, Defendants. } Petition.

The plaintiff Emanuel Oppenheimer says that the defendant The O'Dell Company is a corporation organized under the laws of Ohio, and that from the 25th day of May, 1903, to the date hereof in the city of Cincinnati, Ohio, it conducted a scheme of gambling know as a "bucket shop." That the defendants, William O'Dell, George H. Stapley, John M. Gorman, William C. Dudley, L. W. Foster, John W. Ballman, Thomas F. Shay, Wm. W. Douglas, C. J. O'Dell, Mabel A. Stapley, and Louise O'Dell are interested in said scheme of gambling as officers, stockholders, owners, venders and agents thereof, and otherwise. Plaintiff further says that the defendants are indebted to him in the sum of one thousand four hundred and fifty and 37/100 dollars for money expended by him and paid to the defendant The O'Dell Company between the dates of May 25, 1903, and the date hereof. That the said moneys were expended by the plaintiff in and on account of the scheme of
25 chance and in and on account of the scheme of gambling maintained and conducted by the defendant The O'Dell Company.

That the said sum of one thousand four hundred and fifty and 37/100 dollars is the aggregate losses above the winnings which were incurred by the plaintiff by means of bets and wagers upon the market prices of stocks, grains and other commodities and between the plaintiff and the O'Dell Company continuously and almost daily between the dates of May 25, 1903, and the date hereof. That the said series of bets and wagers upon stocks, grains and other commodities constituted the scheme of gambling and of chance known as the bucket shop, above mentioned. That the said sum was won by the O'Dell Company and was paid to it by the plaintiff and was received from the plaintiff by the O'Dell Company. That by reason thereof an action has accrued to plaintiff by virtue of the statutes against gaming in the State of Ohio.

Wherefore the plaintiff prays for judgment against the defendants in the sum of one thousand four hundred and fifty and 37/100 dollars and for exemplary damages in the sum of $500 and for his costs herein, and for all other and proper relief.

CABELL & FREIBERG AND
MOULINIER, BETTMAN & HUNT,
Attorneys for Plaintiff.

Duly verified.

26 The grand jury immediately reported to the court that your petitioner had made said answers to said questions, and thereupon said court, without hearing any evidence, entered the following order, to wit:

"The court having heretofore ordered that John W. Ballman appear before the grand jury for the April term (1905) and produce before said grand jury a cash book referred to in the order of the court, and to answer the questions propounded by the grand jury, as set out in its charges heretofore filed, and it appearing that the said John W. Ballman has failed and refused to produce said book and has declined to answer said questions, it is now ordered that the said John W. Ballman be taken into custody by the marshal, and that he be confined and imprisoned within the jail of the county of Miami, at Troy, Ohio, in accordance with the former order of this court."

And the court issued the commitment set forth in the answer of Vivian J. Fagin, marshal.

Your petitioner says that said order entered on April tenth, and said commitment, are beyond the jurisdiction of said court, and null and void, and in contravention of the Constitution and laws of the United States, and especially of the fourth and fifth amendments of said Constitution.

JOHN W. BALLMANN.

STATE OF OHIO, Hamilton County, } ss:

John W. Ballman, being first duly sworn, says that he is the petitioner in the above entitled cause, and that the facts stated and allegations contained in the foregoing reply are true as he believes.

JOHN W. BALLMANN.

Sworn to before me and in my presence signed this twelfth day of April, 1905.

[SEAL.] J. W. HEINTZMAN,
Notary Public, Ham. Co., O.

27 And afterwards, to-wit: on the 12th day of April A. D. 1905. there was filed in the clerk's office of said court, a transcript of the proceedings had by and before the district court, of the United States within and for the western division in case No. 1840 which transcript is clothed in the words and figures following, to-wit:

28 THE UNITED STATES OF AMERICA, Southern District of Ohio, Western Division, } ss:

At a stated term of the district court of the United States of America, within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of

America, begun and had in the court rooms at the city of Cincinnati, Ohio, in said district, on the first Tuesday of April being also the fourth day of that month, in the year of our Lord, one thousand nine hundred and five and of the American Independence, the one hundred and twenty-ninth.

Present: The Honorable Albert C. Thompson, judge

Among the proceedings had were the following, to-wit:

In the Matter of JOHN W. BALLMAN. In Contempt of Court.

Be it remembered, that heretofore to-wit: on the 7th day of April in the year of our Lord one thousand nine hundred and five, came the grand jury by their foreman and filed in the clerk's office of said court aforesaid their certain complaint, against John W. Ballman, which said complaint is clothed in the words and figures following, to-wit:

Complaint of Grand Jury.

CINCINNATI, O., April 7, 1905.

To the Honorable A. C. Thompson, judge of the U. S. district court for the southern district of Ohio.

29 SIR: The grand jury for the April term (1905) respectfully represents to your honor and charges that John W. Ballman is guilty of contempt of court in this, to-wit: that upon the 7th day of April, A. D. 1905, a subpœna in due form was served upon said John W. Ballmann, commanding him to appear forthwith before this court and said grand jury, to give testimony concerning a certain matter then under investigation before said grand jury, and to produce at said time and place the cash books, ledgers, letter press copy books and sheets showing the transactions as conducted under the name of A. Smith and A. Johnson with said John W. Ballmann, during the months of December, 1904, and January and February, 1905.

Said John W. Ballman appeared before said grand jury in obedience to said subpœna, but failed, and still fails and refuses to produce before said grand jury the aforesaid books and papers.

The said papers and books are material to an investigation being conducted before said grand jury.

Respectfully submitted,

GEORGE F. DIETERLE, Foreman.

30 And afterwards, to-wit: on the 10th day of April, A. D. 1905, an entry was made upon the journal of said court clothed in the words and figures following, to-wit:

Entry Journal 9, Page 47.

This day came the grand jury for the April (1905) term and presented its charges of contempt of court against John W. Ballman, in writing, signed by the foreman of said grand jury.

Thereupon came into open court the said John W. Ballman, in person and by his counsel, and thereupon the court ordered and directed said John W. Ballman forthwith to produce all books and papers pertaining to the business in which he is engaged, whether as an employer or manager or proprietor—the business with which he is connected—all books and papers within his control.

It is now directed that the above order be entered upon the journals of this court as of April 7, 1905.

And afterwards, to-wit: on the 8th day of April A. D. 1905, there was filed in the clerk's office of said court, charges of contempt by grand jury, clothed in the words and figures following, to-wit:

Charges of Contempt by Grand Jury.

United States District Court, Southern District of Ohio, Western Division.

In the Matter of JOHN W. BALLMAN. In Contempt of Court.

31 To the Honorable A. C. Thompson, judge of the U. S. district court, S. D. O.:

The grand jury for the April term (1905) respectfully represents to your honor and charges that John W. Ballman is guilty of contempt of court, in this, that

Whereas on the seventh day of April, A. D. 1905, said Ballman was duly served with subpœna to appear before this court and this grand jury, to give testimony in a certain matter then under investigation and pending before said grand jury, and being required by said subpœna to produce a certain cash book in use in his business, did, on the seventh day of April and also upon the eighth day of April, 1905, being still under the process of this court, and in contempt of the order of this court, and for the purpose of interfering with the due administration of justice of said court and in said grand jury investigation, wilfully fail and refuse to produce said cash book.

2nd. That the said John W. Ballman, on the eighth day of April, 1905, while giving certain testimony before the said grand jury, while under process of this court so to do, wilfully and knowingly refuse to answer certain questions pertaining to said investigation and material thereto, which said questions are as follows:

(*a.*) State what on account No. 140, sheet # 1, on this big ledger now in use in your business, these figures under the word "folio," on the debit side of the account, to-wit: No. 349, 349, 349, 349, 349, and 351 refer to?

(*b.*) Do not these figures 349 in your handwriting, on account No. 140, refer to the folios in your cash book in use in your business in January, 1905?

Wherefore said grand jury charges that said John W. Ballman

is in contempt of court, and asks that such proceedings may
32 be had as in the premises are in accordance with law.
GEORGE F. DIETERLE, Foreman.

And afterwards, to-wit: on the 8th day of April, A. D. 1905, an entry was made upon the journal of said court clothed in the words and figures following, to-wit:

Entry Journal 9, Page 48.

The charges of contempt presented by the grand jury upon the eighth day of April, 1905, came on to be heard upon the evidence and the arguments of counsel, and after due consideration the court finds that the said John W. Ballman is guilty of contempt of the process and orders of this court, as charged in said information filed by said grand jury, in the following particulars, to wit:

First. That the said John W. Ballman has knowingly failed and refused to produce to and before said grand jury a certain cash book used by him in the conduct of his business, and which said cash book is in his possession or under his control.

Second. That said John W. Ballman has wilfully refused to answer before said grand jury certain questions material to an examination pending before said grand jury, with reference to said cash book, as is specifically charged in the information filed against him.

Wherefore, it is considered, ordered and adjudged by the court that said John W. Ballman produce the said cash book and
33 answer the questions set out in said charges of contempt at twelve o'clock, noon, Monday April 10th 1905, before said grand jury, and in default thereof that he be committed to and confined within the jail of Miami county, at Troy, Ohio, until he complies with the order of this court, or is discharged by due process of law.

And afterwards, to wit: on the 8th day of April, A. D. 1905, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Entry Journal 9, Page 47.

In re JOHN W. BALLMAN.

It is hereby ordered that the said John W. Ballman, give bond in the sum of two thousand five hundred ($2,500.00) dollars for his appearance in this court at twelve o'clock, Monday, April 10th, 1905, to obey the order of this court.

And afterwards, to wit: but on the same day, a recognizance was filed in the clerk's office of said court, which recognizance is clothed in the words and figures following, to wit:

Recognizance.

THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, }

Be it remembered, that on this 8th day of April, A. D. 1905, before me, Benjamin R. Cowen, clerk of the United States district court, within and for the district aforesaid, duly appointed as such by the said court, personally came the — John W. Ballman, as principal, and Robert J. O'Brien, as surety, and jointly and severally acknowledged themselves to owe the United States of America in the sum of twenty-five hundred dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to-wit:

The condition of this recognizance is such that if the said John W. Ballman shall personally appear before the district court of the United States, in and for the district aforesaid, at Cincinnati, Ohio, on April 10th, 1905, at 12 o'clock, noon, and then and there to testify as a witness before the grand jury, and obey the order of the court, and then and there abide the further order of said court, and not depart without leave thereof, then this recognizance to be void otherwise to remain in full force and virtue.

JOHN W. BALLMAN. [SEAL.]
ROBERT J. O'BRIEN. [SEAL.]

Taken and acknowledged before me on the day and year first above written.

B. R. COWEN,
[SEAL.] Clerk U. S. District Court, Southern District of Ohio.

THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, }

I, Robert J. O'Brien, the surety above named, do solemnly swear that after paying my just debts and liabilities, I am worth
34 five thousand dollars in real estate in my own name, situate in the county of Hamilton, in said district.

ROBERT J. O'BRIEN.

Sworn to before me the 8th day of April, 1905.

B. R. COWEN,
[SEAL.] Clerk U. S. District Court, S. D. O.

And afterwards, to-wit: on the 10th day of April, 1905, came the grand jury in open court, and presented its report to said court, clothed in the words and figures following, to-wit:

Report of Grand Jury.

To the Honorable A. C. Thompson, judge U. S. district court, S. D. O.

DEAR SIR: The grand jury for the April term, 1905, reports that John W. Ballman appeared as a witness before this body April 10th, 1905, at 1.30 o'clock p. m. and failed and refused to produce the cash book, referred to in your honor's order of April 8th 1905. Said witness also refused to answer the questions as specified in the charges against him and referred to in said order of court.

Respectfully, GEORGE F. DIETERLE, Foreman.

And at the same time, and in open court, the said grand jury by its said foreman, George F. Dieterle, and as a part of its said report, presented to said court the following answers in writing made by said witness, John W. Ballmann, in said grand jury room, and to and in the presence of said grand jury, and in response to the questions aforesaid, propounded to him by said grand jury, and which said answers are in the words and figures following, to-wit:

35 Answers.

I have not now, and neither at the time of nor at any time since the service of the first subpœna upon me in this matter have I had in my possession or under my custody or control the book referred to in the order of the court entered on April 8, 1905, or any book showing transactions under the name of A. Smith or A. Johnson, and am unable to produce the same.

I decline to answer the questions contained in said order of April 8, 1905, on the ground that it might tend to criminate me and in this connection I produce copy of a petition filed against me and others by Emanuel Oppenheimer in the court of common pleas of Hamilton county, being case No. 126,824, and I state that there are many other actions of the same kind pending against me.

And at the same time produced to said grand jury a copy of the petition of Emanuel Oppenheimer against the O'Dell Company, John W. Ballman and others, and being cause No. 126,824, pending in the court of common pleas of Hamilton county, Ohio, and which said petition is clothed in the words and figures following, to-wit:

Copy of Petition, Hamilton County, O., Com. Pl. Court.

EMANUEL OPPENHEIMER, Plaintiff,
vs.
THE O'DELL CO., a Corporation Organized under the Laws of Ohio; Wm. J. O'Dell, Geo. H. Stapely, John M. Gorman, Wm. C. Dudley, L. W. Foster, John W. Ballman, Thomas F. Shay, Wm. W. Douglass, C. J. O'Dell, Mabel A. Stapley, and Louise O'Dell, Defendants. } Petition.

The plaintiff, Emanuel Oppenheimer, says that the defendant, The O'Dell Company, is a corporation organized under the laws of Ohio, and that from the 25th day of May, 1903, to the date hereof in the city of Cincinnati, Ohio, it conducted a scheme of gambling known as a "bucket shop."

That the defendants William C. Dudley, L. W. Foster, John W. Ballman, Thomas F. Shay, William W. Douglass, C. J. O'Dell, Mabel A. Stapeley, and Louise O'Dell are interested in said scheme of gambling as officers, stockholders, owners, venders and agents thereof, and otherwise.

Plaintiff further says that the defendants are indebted to him in the sum of one thousand four hundred and fifty and 37/100
36 dollars for money expended by him and paid to the defendant The O'Dell Company between the dates of May 25, 1903, and the date hereof. That the said moneys were expended by the plaintiff in and on account of the scheme of chance and in and on account of the scheme of gambling maintained and conducted by the defendant, The O'Dell Company.

That the said sum of one thousand four hundred and fifty and 37/100 — is the aggregate losses above the winnings which were incurred by the plaintiff by means of bets and wagers upon the market prices of stocks, grains and other commodities made between the plaintiff and the O'Dell Company continuously and almost daily between the dates of May 25, 1903, and the date hereof. That the said series of bets and wagers upon stocks grains and other commodities constituted the scheme of gambling and of chance known as the bucket shop, above mentioned. That the said sum was won by the O'Dell Company and was paid to it by the plaintiff and was received from the plaintiff by the O'Dell Company. That by reason thereof an action has accrued to the plaintiff by virtue of the statutes against gaming in the State of Ohio.

Wherefore plaintiff prays for judgment against the defendants in the sum of one thousand four hundred and fifty and 37/100 dollars and for exemplary damages in the sum of five hundred dollars and for his costs herein, and for all other and proper relief.

CABBELL & FREIBERG &
MOULINER,
BETTMAN & HUNT,
Attorneys for Plaintiff.

STATE OF OHIO, Hamilton County, } ss:

37 A. J. Frieberg, being first duly sworn, say- that he is attorney for Emanuel Oppenheimer plaintiff in the above cause and that the plaintiff is not a resident of Hamilton county, Ohio, and that the facts stated in the above petition are true to the best of the knowledge and belief of the affiant.

A. J. FREIBERG.

Sworn to, etc.

And which said report and said answers and said copy of said petition were directed by said court to be filed in the clerk's office of this court, which was accordingly done.

38 And afterwards, to-wit: on the 10th day of April A. D. 1905, an entry was made upon the journal of said court clothed in the words and figures following, to-wit:

Entry Journal 9, Page 50.

The court having heretofore ordered that John W. Ballman appear before the grand jury for the April term (1905) and produce before said grand jury a cash book referred to in the order of the court, and to answer the questions propounded by the grand jury, as set out in its charge heretofore filed. And it appearing that the said John W. Ballman has failed and refused to produce said book and has declined to answer said questions, it is now ordered that the said John W. Ballman be taken into custody by the marshal, and that he be confined and imprisoned within the jail of the county of Miami, at Troy, Ohio, in accordance with the former order of this court.

And thereupon there was issued out of the clerk's office of the court aforesaid our certain writ of final commitment in this cause, directed to the marshal of said district, which said writ is clothed in the words and figures following, to-wit:

Writ of Final Commitment.

District Court of the United States, Southern District of Ohio, Western Division.

39 In the Matter of JOHN W. BALLMAN. For Contempt.

The defendant John W. Ballman, having been tried and found guilty for contempt of court,

Thereupon the court pronounced the following sentence, to-wit: That the said John W. Ballman, be imprisoned in the jail of Miami

county, Ohio, until he answer the questions and produces the book as he was required.

This, therefore, is to command the marshal of said district to take the body of the said John W. Ballman and commit the same to the said jail of Miami county pursuant to the above sentence.

Witness, the Honorable Albert C. Thompson, judge of the district court of the United States, this tenth day of April, A. D. 1905, and in the 129th year of the Independence of the United States of America.

Attest:

B. R. COWEN,
Clerk of the United States District Court, S. D. O.,
[SEAL.] By ROBERT C. GEORGI, Deputy.

And afterwards, to-wit: on the 12th day of April A. D. 1905, an entry was made upon the journal of said court clothed in the words and figures following, to-wit:

Entry Journal 9, Page 53.

This day came the said John W. Ballman, and presented his bill of exceptions and the same being examined and found to be true is hereby allowed, signed, sealed and ordered to be and the same is hereby made part of the record of this cause and filed as provided by law.

And afterwards, to-wit: on the 12th day of April, A. D. 1905, a bill of exceptions was filed in the clerk's office of said court clothed in the words and figures following, to wit:

Bill of Exceptions.

APRIL 8, 1905.

United States Court Room.

In the Matter of the Contempt Proceedings Against JOHN W. BALLMAN.

Before the Honorable Albert C. Thompson, District Judge.

Be it remembered, that at the hearing of the proceedings in contempt against John W. Ballman before the Honorable Albert C. Thompson, district judge on April 8th, 1905, the following proceedings were had.

Mr. BALLMAN: Might I ask delay until Mr. Shay, my counsel, comes in? He was in the building, and stepped out. He has been sent for.

The COURT: The grand jurors may retire to their rooms and I will hear this application as soon as Mr. Ballman can get his coun-

sel here. The district attorney will have the witness he intends to call in support of this application, present.

Mr. McPherson: Our witnesses are here, your honor.

41 The Court: Are any of them the members of the grand jury?

Mr. McPherson: Yes, I have called one or two members of the grand jury.

(At this time Mr. Shay appears before the court and requests that tho charges made against John W. Ballman be shown to him. The court grants time for Mr. Shay to examine the complaint.)

Mr. Shay: I demand in this case, an information specific, and I want time, also, to prepare, and get my witnesses in this court.

The Court: What witnesses? Mr. Ballman is here.

Mr. Shay: I understand, if the court please, that tho charge is made here that this man had a cash book, that he failed to produce.

The Court: The first charge is that he refused to produce the cash book, and the second charge is that he refused to answer certain questions. Now, the grand jury is in session, and while I desire to give him every opportunity to be fully heard in this matter, it cannot be delayed. The Government may proceed with its testimony, if it has any on this first proposition?

Mr. Shay: On the first proposition, we desire, if your honor please, that we shall be allowed a reasonable time—say until this afternoon.

The Court: For what purpose?

Mr. Shay: For the purpose of preparing the law in this case; for the purpose of showing the court that we are not guilty of any contempt and that the act charged against us is not a violation of the statute and that we are standing here simply upon our rights.

42 The Court: I am not able to see that there is any occasion for delay. I will hear the evidence first. Then I will hear what counsel have to say upon the question of the law. I see no occasion for a postponement until this afternoon. On the second proposition it is not necessary to introduce evidence. It is charged that he refused to answer questions which are set forth. Now, it is for the court to say under the law whether he should be required to answer those questions.—Upon the other proposition, I will hear evidence.

Thereupon, George F. Dieterle, being called by the Government and duly sworn, testified as follows:

By Mr. Darby:

Q. Your full name is George F. Dieterle?

A. George F. Dieterle.

Q. You are the foreman of the grand jury for the April term of this court?

A. I am.

Q. Was John W. Ballman a witness before that grand jury.
A. He was.
Q. Will you look at this young man just sitting down and say whether you recognize him?
A. That is Mr. Ballman, yes sir.
Q. Will you state whether or not certain questions were asked of him before the grand jury on this morning?
A. There were.

43 Q. The COURT: I took it for granted that those questions would be admitted, but you may prove them.
Mr. SHAY: They will be admitted.
The COURT: And that he refused to answer.

Q. Mr. Dieterle, state whether or not on yesterday, in the investigation before the grand jury, Mr. Ballman produced a cash book which was called for by his subpœna?
A. He did not.
Q. Will you state whether or not, on this morning, before said grand jury, he produced said cash book which he was called upon to produce, in his subpœna?
A. He did not.
Q. Will you state what he said with reference to the cash book being used in his business, during the months of December, 1904, and January and February and March, and up to April 6th, 1905?

Mr. SHAY: To that question, I object, if the court please, as being incompetent and bearing no relation to any charge that was preferred in this specification.
Mr. DARBY: The specification does not set out that question exactly, but it does charge him with failing to produce a certain book. I propose to show he was inquired of with reference to that book, and that his answers were in reference to it.
The COURT: The question may be answered.
Counsel for respondent excepts to the ruling.

By Mr. DARBY:

Q. (Question read.)
A. The question was asked, and he said there was no such book to his knowledge.
Q. Did that answer pertain to the entire question I put?

Above question objected to as incompetent.

44 Cross-examination waived.

Also, THOMAS J. CLEMENTS, being called by the Government and duly sworn, testified as follows:

By Mr. DARBY:

Q. Mr. Clements, what is your full name?
A. Thomas Joseph Clements.
Q. Where do you live?
A. 2224 Hester street, Walnut Hills.
Q. What is your business?
A. I am a broker.
Q. In whose employ?
A. John W. Ballman's.
Q. The young man who is charged here?
A. Yes.
Q. Were you in his employ during the months of December, 1904, January, February, March and up to the present date in April, 1905.
A. Yes.
Q. Will you state to the court whether or not in December, 1904, and January, February, March and April up to the present, there was in use in that office and in the conduct of Mr. Ballman's business a cash book?
A. I used a cash book for my own personal use; I had——

The COURT: Just answer the question. Listen to the questions and answer them responsively.

Q. Was there a cash book used there?
A. No, not by me.
Q. Was a cash book used in the conduct of that business of Mr. Ballman's?
A. Yes, sir.
45 Q. You say there was?
A. Yes; it was used by myself personally.

Mr. MCPHERSON: You are the bookkeeper for him?
Mr. SHAY: Just a moment—one at a time.
The COURT: Don't interrupt the examination.

Q. Will you state when you saw that cash book last in the office of Mr. Ballman?
A. Monday.
Q. Of what week?
A. This week.
Q. What was that date? Here is a calendar—will you see?
A. It was the 3rd.
Q. April 3rd, 1905?
A. Yes.
Q. You may state whether or not that book was used by you, at that time and before that time, for the purpose of posting the ledger in that office?

The above question is objected to as being incompetent, irrelevant and leading and as not pertaining to the matter set forth in the complaint; the court overruled the objection, to which ruling of the court counsel for respondent at the time excepted.

Q. (Question read.)
A. Yes sir.
Q. Will you state whether or not the ledger account which you posted up to and including March 6th—or April 6th, 1905, shows the folio of that cash book?

Above question is objected to as incompetent, irrelevant and leading, and as not relevant to the issues involved; the court overruled the objection, to which ruling of the court counsel for respondent at the time excepted.

46 Q. Answer that question, please?
A. Was there any folios?
Q. (Question read.)
A. Well, it was from the slips.—No, it was from slips.
The COURT: Do you understand the question? Read the question to him.
Q. (Question read.)
The COURT: Did the ledger show the folios of that cash book?
A. Up to the 3rd.
Q. And prior to that time, in your handwriting?

Above question is objected to as incompetent and not pertinent to the issue. The court overruled the objection, to which ruling of the court, counsel for the respondent at the time excepted.

A. Previous to the 3rd, there was some posting in there.
Q. From this cash book?
A. From this cash book which I, myself, done personally.

Mr. SHAY: I wish to have the court make the direction that the stenographer may note the objection each time, so that I may not be required to interrupt with objection, to repeat the objection to each question.
The COURT: I want you, Mr. Shay, to have every objection noted that you see proper to make, with whatever statement you desire to make. Your objection will be entered and your exception noted.

Q. You say that up to April 3rd, you posted this ledger from that cash book?
A. I don't know if it was the 3rd; but I wouldn't be positive if it was the third, or not, because my memory there is not ex-
47 actly clear.
Q. I will ask you to look at this account (indicating in book) just look at No. 133, and I will ask you if up to and including April 4th, those entries are not made from that cash book, and if the folio does not appear there as 382, for that date, in your handwriting?
A. That is 382.

Q. That is the folio of the cash book?

A. No, it is not taken from the cash book.

Q. That is the folio of the cash book, is it?

A. No, sir; it is not; that 382 is a memorandum taken off the slip.

Mr. SHAY: What date is that?

Q. April 4th Now, look at April 3rd, and see if that is not in your handwriting, and if that folio is not given there as 382, and if that was not taken from the cash book?

A. I don't think that was taken from the cash book, either.

Q. Didn't you testify before the grand jury last evening?

A. Yes, sir.

Q. That these figures under the word "folio," were taken from that cash book and represented the folio in that cash book in use in Mr. Ballman's office?

A. Yes, and I also said——

Q. But you did say that?

The COURT: Let him answer.

A. I also said there was some of them taken from slips; when we didn't put them in the cash book; we put them on slips; some are taken from slips; and numbered; some are cash book and some are slips.

The COURT: The point of this question was, did you testify
48 before the grand jury that these two items of April 3rd and 4th were taken from the cash book?

A. No sir; not those particular items.

Q. Mr. Clements, this cash book contained what with reference to Mr. Ballman's office? Mr. Ballman's business?

A. The cash book that I kept—if I may be allowed to explain.

Q. The cash book you are referring to—to which book do you refer?

A. Was the cash book I kept myself.

The COURT: Is that the one referred to in the book there?

A. I put some in there, yes sir.

The COURT: That is the one he is calling your attention to—that one that appears in this ledger? Put a more specific question.

Q. Will you state what the book contained, with reference to the daily transactions in Mr. Ballman's business, during December, 1904, January, February, March and April, 1905?

Above question is objected to as incompetent and irrelevant; the court overruled the objection, to which ruling of the court counsel for respondent at the time excepted.

A. What reference that cash book had?

Q. No; what that book showed—what transactions appeared upon that book, in Mr. Ballman's business?

A. I can't remember what appeared upon that book during those months.

Q. In a general way what were the transactions contained in that book?

A. Some people paid me money, and I credited it; when I paid some people, I put that on there; but I didn't always fix up the cash; sometimes it was on slips.

49 The COURT: You used this cash book sometimes in making entries in the ledger?

A. Yes, sir.

By the COURT:

Q. And do you mean to say you noted that in the ledger?

A. Yes, sir.

Q. How? Point out one entry of that kind?

A. January 9th, by cash, $1488.33, and the number "338."

Q. What does "338" mean?

A. That means the page.

Q. Of what? Of the cash book?

A. If there was a cash book, or if it was a slip.

Q. It was the page of the cash book?

A. Or the slip.

Q. Would the slip have such a number?

A. We numbered them; Mr. Hunt numbered slips,—the slips were numbered—sometimes we would number them. The slips were numbered mostly by Mr. Hunt.

By Mr. DARBY:

Q. But the slips were not kept, were they?

A. No, sir.

Q. But the cash book was?

A. I haven't seen the cash book; I haven't——

Q. The cash book was kept, as far as your knowledge goes, up to last Monday?

A. The book was there.

Q. That is what I mean.

The COURT: I want you, Mr. Clements, to listen to these questions and give direct, straightforward answers—responsive answers.

A. Yes, sir.

50 —. That is what the court expects of you.

A. Yes, sir.

Q. Now, I want to call your attention to this page, account 140, and ask you to state in whose handwriting those items are under date of January 26, 1905?

A. Those there? (Indicating.)

Q. Yes.

A. Those are not my handwriting.

Q. I didn't ask you that—I asked you in whose handwriting they were?

A. I will have to look for a moment, to see—I think that is Hunt's handwriting—that is Hunt's.

Q. Don't you know, as a matter of fact, and didn't you testify before the grand jury last night that that is Mr. Ballman's own handwriting?

A. Yes, that is Mr. Ballman's.

Q. What about this one above—the one I called your attention to a moment ago—is there any question about that in your mind?

A. No; those are Mr. Ballman's I am pretty sure.

Q. You know they are not Hunt's?

A. They are Mr. Ballman's I think.

Q. What does those figures under the head of "folio," 349, refer to?

—. Well, now Mr. Ballman entered those; I don't know whether he took—I suppose he took them from the slips——

The COURT: Not what you suppose—tell us what you know; if you don't know, say so.

A. As I say, I don't know; Mr. Ballman entered those.

Q. Is that in your handwriting, just below the items of January 30, and 31?

A. Yes sir.

Q. The figures, 349, and 351, under the word "folio" refer to what there?

51 A. I don't know if they were taken from the cash book or from the slips.

Q. The cash book was in use at that time, was it?

A. January 30—I used one around there.

Cross-examination.

By Mr. SHAY:

Q. You say that this cash book that you speak of, was your individual property?

A. Yes.

Q. Can you swear that ever was in the hands of John W. Ballman?

A. I can't swear that it ever was.

Q. Do you know that he had any knowledge of its existence?

A. No.

By Mr. DARBY:

Q. How long have you been working for Mr. Ballman?

A. About five years and a half.

Q. How long have you been his bookkeeper?

A. Well, I don't know as I am exactly bookkeeper, I worked on the books after I was there about three years, as far as what little bookkeeping there was, in making statement; I don't call myself

a bookkeeper, I call myself a general clerk, most all the time on the outside.

Q. You were under salary from Mr. Ballman, were you?

A. Yes, sir.

52 Also FRANK M. KRAMER, being called by the Government and duly sworn, testified as follows:

By Mr. DARBY:

Q. Your full name please?

A. Frank Marcus Kramer.

Q. Where do you live?

A. 409 East 6th street, Newport.

Q. What is your business?

A. Standing at the grain-board board marker.

Q. At what board?

A. John W. Ballman's office.

Q. How long have you been engaged in Mr. Ballman's employ?

A. About three years.

Q. Were you engaged there continuously during the last four or five months?

A. I was.

Q. When did you see the cash book in use in that business last?

A. I can't say, as I don't know which—under what name they go.

Q. There was a book there, known as the cash book, was there not?

A. I think there was.

Q. When did you last see that book?

A. About Monday.

Q. Monday of this week, do you mean?

A. Yes.

Q. Where did you see it at that time?

A. Why lying on the desk.

Q. What desk?

A. The desk in the office.

53 Q. What desk?

A. Why, the one in the front part of our office.

Q. Whose desk was that?

A. The bookkeeper's desk.

Q. That was there, in sight of all persons coming and going, was it?

Above question is objected to, and the court rules the witness may answer, to which ruling counsel for respondent excepted.

Q. Was it, or not, in sight of all persons coming and going?

A. They could—if they would look in the window.

Q. I mean people going inside of that office? Mr. Ballman was in and about, in and out of the office how much during the day?

A. I can't say.

Q. Was he there every day?
A. I can't say.
Q. Was he there every day?
A. I can't say.
The COURT: Why can't you say?
A. Why, as I was out on the board, I see very little of the clerks in the office.
The COURT: Where is your place?
A. Outside of the office.
Q. Where?
A. Outside of the office room.
Q. In the building?
A. Oh, yes.
Q. What do you do?
A. Mark the Chicago grain board.
Q. You know Mr. Ballman?
A. Certainly.
Q. You see him coming—come in and go out?
54 A. I did.
Q. You see him go into that office and come out of it?
A. I have.
Q. Every day?
A. Not every day; I don't see Mr. Ballman every day.
Q. About how often?
A. Maybe once or twice in a whole day.
Q. Once or twice in a whole day? He is away from home sometimes?
A. Yes.
Q. When he is at home, at his office, is he there in that office?
A. Well, he is in and out at all times of the day, and all that I see of him is not very often.

By Mr. DARBY:

Q. That book was the record of what transactions in the office?
A. I cannot say.
Q. Why not?
A. Why, as I got to see very little of the book of the office as it were just what concerned me and that concerned me nothing whatever, as I see nothing of it, as I say—of the entries in that book.
Q. Did not that book, to your knowledge, contain the transactions of that office, as they occurred from day to day?
A. I don't know.
Q. To your knowledge, I say, did not that book contain those transactions?
A. To my knowledge, I would say, I don't know, but it might.
Q. Did you not testify before the grand jury on your first examination in this matter, that the book did contain the transactions that were done in that office?
A. No.

55 Q. And that they were copied there from certain slips by the bookkeeper, Mr. Clements, and then the entries carried from the cash book into the ledger? Wasn't that your testimony before the grand jury two or three days ago?

A. I say that the entries were made, as far as I saw from the outside of the window.

Q. Of what window?

A. Outside of the window of the office.

Q. Outside of the building?

A. No, no.

Mr. McPherson: The office is separated by glass partitions or glass windows.

Q. That is, you saw entries made in that book, from wherever you were in that office, by whom?

A. No, not all the time, only the time when I would walk up to the window.

Q. By whom were those entries made in that book then?

A. When I saw it, it was Hunt and Mr. Ballman.

Q. And whom else?

A. Mr. Clements.

Q. You would see each of those three persons make entries in and use that cash book?

A. No, I will not say positive that it was the cash book.

Q. What kind of a book was it?

A. Why, that——

The Court: This particular book that he is calling your attention to?

Q. Describe that book? Describe the book to the court?

A. The Court: Describe the book to the witness.

Q. Was that not a cash book, which was a solid book, and not a loose-leaf ledger, about, probably 17 inches long, containing
56 the cash transactions of that business, made either by those persons you referred to—made by those persons, day by day?

A. As I say, I can't say if it was a loose leaf cash book, or if it was a solid book.

The Court: What was its shape and form?

A. Just as he says: about that long (indicating).

The Court: How broad?

A. About that broad (indicating).

The Court: How thick?

A. About an inch or an inch and a half.

Q. Was it not such a book as this? (indicating) loose-leaf ledger.

A. I don't know——

Q. I mean, a book of the size and shape of that?

A. No, sir.

Q. There is no other book of the size and shape of that one in that office?

A. I don't know.

Q. You never saw any?

A. No, not to my knowledge.

Q. Mr. Kramer, didn't you swear before the grand jury in this matter that this cash book to which you referred, contained the receipts—the daily receipts from customers, upon one side, and the disbursements of cash upon the other side?

A. The way I said it was, I thought——

Q. No, did you say that?

A. No, I don't think I did.

Q. Well, you say you thought it was what?

A. I thought there was a debtor and creditor side, on each side of the cash book, as you say,—because I am studying bookkeeping myself,—that is the way I thought it was operated under that plan, because I know books operating like that.

57 Q. That is, upon one side there was a credit account, and upon the other page a debit?

A. That is the way I thought.

Q. A whole page devoted to the debtor, and one to the creditor?

A. That is the way I have my books there.

Q. No, I don't mean your books—I mean that book, you saw those people writing in?

A. I don't know.

By the COURT:

Q. What did you tell the grand jury?

A. I said the entry—they entered sheets of paper in this here book—I mean, items from sheets of paper in this here book, which I saw.—That is what I told them—which I saw them enter from sheets of paper—items into this here book.

Q. You saw items taken from sheets of paper and carried into the book?

A. Yes.

Q. By these men you have mentioned?

A. Yes.

Q. That was a book such as you saw, which you say had charges on one side and credits on the other?

A. Well, that I cannot say.

Q. Well, what did you mean when you said that?

A. Well, I don't know if it—if they had it on just one page a debtor and credit side, or on just one leaf.

Q. What made you believe it was a book of that kind?

A. Well, as I used a debtor for one page and a creditor for the other page myself.

Q. You saw this book?

A. Yes.

58 Q. Did you see that?
A. Yes.
Q. You say that it was a debit on one side and credit on the other side?
A. There was items on both sides of the page.
Q. Now repeat again, or try to recall and repeat, just what you told the grand jury?
A. In what questions?
Q. About that book.
A. Well, I says that the entries in this book, which I see, were made from slips of paper.
Q. Is that all you told the grand jury?
A. No, I told them a great deal of questions more, but not concerning the cash book.
Q. Your memory is good, is it not?
A. Yes, as far as I know.
Q. Is it not very long since you were examined there?
A. No, sir, they didn't ask me very many questions about the cash book.

The COURT: Direct his attention to anything further you desire him to testify to.

By Mr. DARBY:

Q. Mr. Kramer, I want to ask you if you did not testify to the grand jury, that this cash book, referred to, and which you were then testifying about, contained upon one side the cash items as they were paid into that office, and upon the other side, the cash items as they were disbursed?
A. I will say I did.
The COURT: What is it?
A. I did.

59 Cross-examination.

By Mr. SHAY:

Q. Mr. Kramer, you say that you are studying bookkeeping?
A. Yes.
Q. You saw the books in this office? When was the last time you saw that book?
A. I think it was Monday—Saturday or Monday.
Q. Now, are you able to say, of your own knowledge, that you ever read any items in that book?
A. No, sir.
Q. Do you know whether or not it was a cash book, or are you guessing, or coming to a conclusion of that character?
A. No, sir; I don't say it was a cash book; under what name it went, I don't know.
Q. Nor what it contained you don't know?

A. Nor what it contained, nor these items that these gentlemen entered.

Q. You saw them writing from slips?

A. Slips, yes.

Q. What the slips contained, you don't know?

A. I don't know.

Q. How long ago did you—or can you remember any one time that you ever saw Mr. Ballman use that?

A. I cannot designate the right time, the time when he did that—it has been a long time.

Q. How long ago?

A. I venture to say, about six or seven months.

Q. You have never seen him, at any time since that, use the book?

A. No, sir.

Q. Would you be able to swear that the book you saw Mr. Ballman using or writing upon, was the same book that you saw in the office on last Monday?

60 A. I can.

Q. You think it was?

A. I think it was.

Q. Your duties call you, you say, outside of the office?

A. Outside of this here partition, yes, sir.

Q. And you are there actively engaged throughout the day?

A. Throughout the day.

Q. You haven't anything to do with the clerical department?

A. No, sir.

61 Also, ELMER S. HUNT, being called by the Government and duly sworn, testified as follows:

By Mr. DARBY:

Q. Where do you live?

A. 2403 Colerain (?) street.

Q. Are you engaged in business with Mr. Ballman?

A. I am.

Q. Are you an employé of his?

A. I am.

Q. What is your business in that office?

A. I receive telephone orders and collect money.

Q. Will you state whether or not recently, in the conduct of Mr. Ballman's business, there has been used a cash book?

A. I cannot.

Q. Why not?

A. Because I don't know.

Q. Do you swear to his honor that you do not know that a cash book was used in that business?

A. I do.

Q. Did you not testify before the grand jury last night, at six

o'clock, that there was a cash book used in that business, and that you saw it a week or ten days ago?

A. I said that there was one, but I hadn't seen it for some time, I didn't know just when I had seen it last.

Q. Didn't you testify that you had seen it a week or ten days before last night?

A. No. I don't think I did.

Q. How long ago did you see that cash book?

A. I couldn't say positive.

62 Q. About how long ago?

A. I can't say whether it has been a week or two weeks or three weeks.

The COURT: Give us your best recollection about it. Fix some time. You can fix some time.

A. I can't fix the time.

The COURT: Oh, yes, you can,—you know whether it was this year or last year?

A. Oh, it has been since the first of the year.

Q. Has it been since the office was removed to the Carew building?

A. I think so.

Q. You know that, don't you? And didn't you testify before the grand jury that it was since Mr. Ballman removed from Third street to the Carew building—didn't you testify to that last night, at six o'clock, when you were before the grand jury?

A. I testified that I saw it.

Q. That you saw it in his office in the Carew building?

A. Well, I don't know. You fellows had me so mixed up in there I——

The COURT: Just answer the questions.

A. I believe I did say something like that.

The COURT: Then why do you hesitate to tell it?

A. I was trying to think whether I said it or not.

The COURT: It will — better for you to make frank answers to these questions.

Q. You removed — that office in the Carew building from Third street on or about the 13th day of March—about three weeks ago?

A. Just about.

Q. Now, on Wednesday and Thursday of this week, you were the acting bookkeeper in that office?

63 A. Thursday and Friday.

Q. The 6th and 7th of April. At that time, this book which is now open before his honor, this ledger (indicating) was in your possession, was it not?

A. It was there in the office.

Q. Yes, you had——

A. I had access to it.

Q. And you made entries in it on the 5th and 6th or on the 6th, of April. Now, I will ask you if you did not make entries here

which show, under the word "folio," the numbers of the pages in the cash book?

A. They are number of the pages on the cash slips—not the cash book.

Q. Where was the cash book?

A. I don't know.

Q. Where did you get these numbers?—they follow serially?

A. I took them from the sheet of the day before.

Q. You say that these cash sheets had the numbers of the folios, the folio number upon them?

A. They have folio numbers upon them, yes.

Q. Then these sheets that you were using, you did not keep for any purpose?

A. No, sir.

Q. The system of copying from the sheets into the cash book, and from the cash book into the ledger, have been in vogue for how long a time?

A. I should think for about three or four months.

Q. That had been going on, and you put down here, opposite an entry on the 5th, a folio number, that number, 385?

A. Of the cash slip.

The COURT: What word is used there?

64 Q. The word "folio."

The COURT: What did you use the word "folio" for?

A. "Folio" used in the book, there is a line ruled off, with "folio" at the top—a line ruled off for it there, and I placed it there.

Cross-examination.

By Mr. SHAY:

Q. At the time you made those entries, Tuesday and Wednesday last, you had no cash book in the office—no cash book in your possession?

A. I had not, I didn't see any.

Q. You hadn't seen any cash book for a week past or more?

A. I don't think I had; I don't think I saw any this week.

Q. You have no knowledge that Mr. Ballman ever saw any cash book?

A. I have not.

65 Also, GEORGE F. DIETERLE, being recalled, testified as follows:—

By Mr. MCPHERSON:

Q. Mr. Dieterle, I wish you to state to the court what answer Mr. Clements made to this question, when I asked him—when I put it to him last night, and asked all the jurors present to listen to it carefully and remember it,—when I said to him, "Mr. Clements—then,

Mr. Clements, the cash book that you say you saw on April 3rd, in the office of John W. Ballman, upon one side contained all of the names—the cash received that day, and upon the other side the name of the person and the amount of cash received, I mean; upon the other side it contained the name of the person and the amount of any cash disbursed," and if he did not answer that, "Yes, that is correct?"

Mr. SHAY: I object to the question. My first objection is that it is incompetent and irrelevant; further, my objection is, that he is introducing the witness Clements as his own witness. My objection is further, that the witness cannot be impeached in that way. My objection is further, that the defendant, John W. Ballman, is the person answering to the court, and we are not trying the credibility of the witness introduced by the Government, and it cannot have any effect as to this, one way or the other.

The COURT: What was Mr. Hunt's relation there?

Mr. MCPHERSON: He was also a clerk in the office.

The COURT: Clements and Hunt were both clerks there.

66 Mr. MCPHERSON: Your honor, upon consultation, I will withdraw that question.

Mr. DARBY: Your honor, we want now to introduce two pages of this book, and exhibit them, to show the manner in which this record was kept, without any more than simply looking at the number of the account and the cash entries.

Mr. SHAY: We object to it.

Mr. DARBY: He will introduce these now, and furnish copies of the pages. Copies are hereto attached marked Exhibits "H" and "I."

Mr. SHAY: It is admitted under the same ruling of your honor.

The COURT: Yes.

Mr. SHAY: Then we will reserve our exception.

The COURT: Very well.

Mr. SHAY: If the court please, I desire now to ask that John W. Ballman be discharged for the reason, first, that there is no legal charge preferred against him; secondly, because there is no legal testimony offered by which he can be found guilty of any offense.

The COURT: This charge is contempt in refusing to answer certain questions and to produce a certain book.

Mr. SHAY: Yes, as to the book, we say to your honor we
67 haven't got it. As to the two questions, Mr. Ballman requests me to place this in your honor's hands. (Handing paper to the court.) There is no evidence that the defendant had any book in his possession at any time since this inquest was instituted.

(The paper so placed in the hands of the court reads as follows: "As to the questions asked, I refuse to answer, as they might tend to criminate me.")

The COURT: He declines to answer the questions because it might incriminate him?

Mr. SHAY: Yes, sir.

The COURT: When the questions themselves, show, in the connection in which they are asked, or tend to show any reason why they might incriminate him in any way, his privilege will be respected; and where it fails to show that, where apparently, it is utterly inconsistent with any suggestion of crime, there must be something more than this bare statement or claim to support his right to the exercise of the privilege.

Mr. SHAY: That question I would be glad to argue to your honor if you can give us a little time.

The COURT: Mr. Ballman is not charged with any crime; he is simply summoned as a witness to testify to facts pertinent to the inquiry being made by the grand jury. Now, in view of the
68 case that has been presented, if the court can see that in any way it might tend to incriminate him about anything, the court would respect the privilege; but I fail to see anything here—there is nothing suggested in the questions, or in any surroundings, that would indicate in any way anything of that kind to the mind of the court.

Mr. SHAY: I have always understood the rule to be that while it might not appear to the court, that it might appear to himself; and that after he has availed himself of that privilege, it is not in the power of the court to question it,—that he himself is the judge of that.

The COURT: Yes, he is the judge, but where all the circumstances and surroundings refute the truth of the suggestion, the court is not bound to accept his statement. You have evidance to offer, Mr. Ballman?

Mr. SHAY: No, sir.

The COURT: Then I will hear your argument, Mr. Shay.

Mr. MCPHERSON: Before the case is closed, as a matter of record, we desire to introduce in evidence and file the return of the summons, showing him legally served with subpœna.

(Said paper is marked "Exhibit F" and copy attached.)

(Counsel for respondent also offer in evidence the written reason given by John W. Ballman for refusing to answer certain questions, which paper is marked "Exhibit G" and copy attached.)

69 And the foregoing was all of the evidence at said hearing, and thereupon the court entered its judgment and order as appears of record and orders this certificate to be filed as part of the record, which is accordingly done.

A. C. THOMPSON, Judge.

The following are the exhibits referred to in said bill of exceptions and attached thereto.

EXHIBIT "F."

SOUTHERN DISTRICT OF OHIO, Western Division, } ss:

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

We command you to summon John W. Ballman to bring cash book, ledger, letter press copy books & all sheets showing transactions under the name of A. Smith & A. Johnson during months of Dec. 1904 & Jan. & Feb. 1905 of —— county of —— district and State aforesaid, if he be found in your district, to be and appear before the judge of the district court of the United States, for the southern district of Ohio, at Cincinnati, Ohio, *on the* forthwith, to give testimony on behalf of the United States before the grand jury, and the truth to say on such matters as may be then and there required, and not depart without the leave of the court or the district attorney.

And have you then and there this writ.

Witness, the Honorable Albert C. Thompson, judge of the United States district court, this 7 day of April 1905 in the 129th year of the Independence of the United States of America.

Attest: B. R. COWEN, Clerk,
[SEAL.] By ROB'T C. GEORGI, Deputy.

[Endorsed:] Marshal's criminal docket # 4536. United States district court, southern district of Ohio, western division. Subpœna for grand jury witness. April term 1901, forthwith. Filed Apr. 8, 1905. B. R. Cowen, clerk. S. McPherson, U. S. att'y.

SOUTHERN DISTRICT OF OHIO, Western Division, } ss:

I received this writ at Cincinnati, at — o'clock — m., on the 7 day of April, 1905, and served the same by copy, as follows:

Personally on John W. Ballman at — o'clock, — m., on the 7 day of April, 1905.

VIVIAN J. FAGIN,
U. S. Marshal, S. D. O.,
Per J. F. GARDNER, Deputy.

Fees: 50c.

EXHIBIT "G."

As to the questions asked I refuse to answer, as they might tend to incriminate me.

70 EXHIBIT H.

Sheet No. 1. Account No. 140.

Name, Dominick & Dominick.
Address, c/o B. Ryon.

Date.	Item.	Folio.	Debit.	Balance.	Date.	Item.	Folio.	Credit.	Balance.
1905.					1905.				
Jan. 26	To C.....	349	1750		Feb. 2	By.....	350	4287 50	
	C.....	349	1500						
	C.....	349	1000						
27	C.....	349	500						
30	C.....	349	1000						
31	C.....	351	500 00						

71 EXHIBIT "I."

Account No. 26. Sheet No. 133.

Name, Geo. De Camp.
Address, ——.

Date.	Item.	Folio.	Debit.	Balance.	Date.	Item.	Folio.	Credit.	Balance.
1905.					1905.				
Apr. 1	To 4965.....		20		Apr. 1	By ret....	3	3 75	
	4975.....		20				382	56 25	
	4976.....		20		3	40 shares....		5	
3	750.....		60			4452.....		65	
	2033.....		60			4507.....		50	
	2360.....		60			4875[4786]		37 50	
	3647.....		60			4836.....		30	
	3416.....		60			4990.....		25	
	4461.....		50			4993.....		7 50	
	4703.....		25				382	425	
	4715.....		10						
	4733.....		10						
	4734.....		10						
	4757.....		50						
	4343.....		50						
	4873.....		20						
	4871.....		10						
	4990.....		20						
	4993.....		50						
	4998.....		20						
	5005.....		20						

72 EXHIBIT "J."

Sheet No. 27. Account No. 133.

Name, Geo. De Camp.
Address, ——.

Date.	Item.	Folio.	Debit.	Balance.	Date.	Item.	Folio.	Credit.	Balance.
1905.					1905.				
Apr. 4	To 1052		20		Apr. 4	By 50 shares		6 25	
	4299		20			4390		125	
	750		10			4450		85	
	2033		10			4965		26 25	
	2360		10			4975		22 50	
	3366		10				382	35	
	3569		10		5	4950		22 50	
	3647		10			5027		23 75	
	3416		20			5056		25	
	4461		20			30 shs		3 75	
	4715		10			C	384	45	
	4757		20		6	40 shs		5	
	4343		20			4460		62 50	
	4998		10			4490		62 50	
	5014		20			4495		67 50	
	5027		20			4520		43 75	
	5030		20			4793		46 25	
	5037		40						
5	1052		20						
	3366		10						
	4998		10						
	5005		20						
	5058		20						
	5056		20						
	5072		20						
				45					
6	1052		60						
	4299		20						
	2258		20						
	3366		30						
	4877		20						
	5090		20						
	5097		40						
	6007		20						
	C	385	57 50						

73 And afterwards, to-wit: on the 12th day of April, A. D. 1905 a certificate was filed in the clerk's office of said court clothed in the words and figures following, to-wit:—

Certificate of Judge Thompson and Exhibits.

United States District Court, Southern District of Ohio, Western Division.

In the Matter of JOHN W. BALLMAN. No 1840.

Be it remembered, that on April 10th, 1905, the grand jury presented to the court the report which is hereto attached marked Exhibit No. 1, and reported that said John W. Ballman had made to said questions and demand the answers hereto attached marked Exhibit No. 2, and that Exhibit No. 3 hereto attached is the copy of the petition in the case of Oppenheimer produced by said Ballman and referred to in his said answer.

And thereupon the court without hearing further or other evidence made and entered the judgment as appears of record.

And it is ordered that this certificate be filed as part of the record which is accordingly done.

A. C. THOMPSON, Judge.

EXHIBIT No. 1.

To the Honorable A. C. Thompson, judge U. S. district court, S. D. O.

DEAR SIR: The grand jury for the April term, 1905 reports that John W. Ballman, appeared as a witness before this body April 10th, 1905 at 1:30 o'clock p. m. and failed and refused to produce the cash book referred to in your honor's order of April 8th,
74 1905, said witness also refused to answer the questions as specified in the charges against him and referred to in said order of court.

Respectfully, GEORGE F. DIETERLE, Foreman.

EXHIBIT No. 2.

I have not now, and neither at the time of nor at any time since the service of the first subpœna upon me in this matter have I had in my possession or under my custody or control the book referred to in the order of the court entered on April 8th, 1905, or any book showing transactions under the name of A. Smith or A. Johnson, and am unable to produce the same.

I decline to answer the questions contained in said order of April

8, 1905, on the ground that it might tend to criminate me, and in this connection I produce copy of a petition filed against me and others by Emanuel Oppenheimer in the court of common pleas of Hamilton county, Ohio, being case No. 126,824, and I state that there are many other actions of the same kind pending against me.

EXHIBIT No. 3.

Court of Common Pleas, Hamilton County, Ohio.

EMANUEL OPPENHEIMER, Plaintiff,
vs.
THE O'DELL COMPANY, a Corporation Organized under the Laws of Ohio; William J. O'Dell, George H. Stapeley, John M. Gorman, William C. Dudley, L. W. Foster, John W. Ballman, Thomas F. Shay, William W. Douglass, C. J. O'Dell, Mabel A. Stapeley, and Louise O'Dell, Defendants.

75 The plaintiff, Emanuel Oppenheimer, says

That the defendant, The O'Dell Company is a corporation organized under the laws of Ohio, and that from the 25th day of May, 1903 to the date thereof, in the city of Cincinnati, Ohio, it conducted a scheme of gambling known as a "bucket shop."

That the defendants, William J. O'Dell, George H. Stapeley, John M. Gorman, William C. Dudley, L. W. Foster, John W. Ballman, Thomas F. Shay. William W. Douglass, C. J. O'Dell, Mabel A. Stapeley, and Louise O'Dell, are interested in said scheme of gambling as officers, stockholders, owners, venders and agents thereof, and otherwise. Plaintiff further says that the defendants are indebted to him in the sum of one thousand four hundred and fifty and 37/100 dollars for money expended by him and paid to the defendant between the dates of May 25, 1903, and the date hereof. That the said moneys were expended by the plaintiff in and on account of the scheme of chance and in and on account of the scheme of gambling maintained and conducted by the defendant The O'Dell Company.

That said sum of one thousand four hundred and fifty and 37/100 is the aggregate losses above the winnings which were incurred by the plaintiff by means of bets and wagers upon the market prices of stocks, grains and other commodities made between the plaintiff and the O'Dell Company continuously and almost daily between the dates of May 25, 1903, and the date hereof. That the said series of bets and wagers upon stocks, grains and other commodities constituted the scheme of gambling and chance known as the "bucket shop," above mentioned. That the said sum was won by the O'Dell Company and was paid to it by the plaintiff and was received
76 from the plaintiff by the O'Dell Company. That by reason thereof an action has accrued to plaintiff by virtue of the statutes against gaming in the State of Ohio.

Wherefore the plaintiff prays for judgment against the defendants in the sum of one thousand four hundred and fifty and 37/100 dollars and for exemplary damages in the sum of five hundred dollars and for his costs herein, and for all other and proper relief.

CABELL & FREIBERG AND
MOULINIER, BETTMAN & HUNT,
Attorneys for Plaintiff.

STATE OF OHIO, Hamilton County, } ss:

A. J. Freiberg, being first duly sworn says that he is the attorney for Emanuel Oppenheimer, plaintiff in the above cause, and that the plaintiff is not a resident of Hamilton county, Ohio, and that the facts stated in the above petition are true to the best of the knowledge and belief of the affiant.

A. J. FREIBERG.

Sworn to, &c.

——, ——.

THE UNITED STATES OF AMERICA, Southern District of Ohio, Western Division, } ss:

I, Benjamin R. Cowen, clerk of the district court of the United States, within and for the district and division aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above entitled cause as the same appears of record and on file in said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Cincinnati, Ohio, this 12th day of April, A. D. 1905.

[SEAL.]

B. R. COWEN, Clerk,
By ROBERT C. GEORGI,
Deputy Clerk.

77 And afterwards, to-wit: on the 12th day of April A. D. 1905, and entry was made upon the journal of said court, clothed in the words and figures, following, to-wit:

Entry Journal 8, page 33.

This cause came on this day to be heard and was argued by counsel and submitted to the court.

And afterwards, to-wit: on the 13th day of April A. D. 1905, an entry was made upon the journal of said court, clothed in the words and figures following, to-wit:

Entry Journal 8, page 34.

This proceeding came on to be heard upon the petition for writ of *habeas corpus*, the answer thereto, the reply of the petitioner, and the evidence, including the record of the proceedings of the district court of the United States for the southern district of Ohio, western division, in the matter of John W. Ballman for contempt, No. 1840, and was argued by counsel and submitted to the court. On consideration whereof, the court dismisses said petition and remands the petitioner to the custody of the marshal. To all of which the petitioner excepts.

And afterwards, to-wit: on the 14th day of April A. D. 1905 a petition for appeal and assignment of errors was filed in the clerk's office of said court, clothed in the words and figures following:

Petition for Appeal and Assignment of Errors.

78 Circuit Court of the United States, Southern District of Ohio, Western Division.

In the Matter of JOHN W. BALLMAN. No. 6007.

Petition for Appeal and Assignment of Errors.

John W. Ballman prays an appeal to the Supreme Court of the United States from the order and judgment of this court dismissing his petition for writ of *habeas corpus*, and assigns as error that this court has erred

1. In holding that the orders of the district court entered April 8th and 10th, 1905, refer to the cash book testified about by witnesses who testified at the hearing on April 8th, and that said orders are not confined to a book containing transactions in the name of A. Smith or A. Johnson.

2. In holding that there was any legal evidence to sustain the order of April 8th.

3. In holding that the order of April 7th was not in contravention of the fourth amendment of the Constitution of the United States.

4. In holding that there was any evidence before the court to show the existence on or after April 7th of the book testified to by witnesses at the hearing on April 8th.

5. In holding that the petitioner was required on said hearing to account for the loss or destruction of said book prior to April 7th.

6. In holding that the petitioner was required to answer
79 said questions notwithstanding his claim of privilege.

7. In holding that said orders and judgments of the district court and each of them were not beyond the lawful power and authority of said court and in contravention of the Constitution of

the United States, especially of the fourth and fifth amendments thereof.

8. In holding that the said orders and commitment of the district court were not void for indefiniteness and uncertainty because of the indeterminate punishment thereby inflicted upon your petitioner.

9. In dismissing said petition for writ of *habeas corpus*.

LAWRENCE MAXWELL, JR.,
MILLER OUTCALT,
THOMAS F. SHAY,
Counsel for Ballmann.

And afterwards, to-wit: on the 14th day of April A. D. 1905, an entry was made upon the journal of said court clothed in the words and figures following, to-wit:

Entry Journal 8, page 34.

On consideration of the petition of John W. Ballman for an appeal to the Supreme Court of the United States, it is ordered in open court that an appeal to the current session be, and the same hereby is, allowed, upon condition that the said petitioner shall file a transcript of the record in this case in the Supreme Court of the United States on or before April 24th, 1905.

And it is further ordered that said Ballman, pending said appeal, may be enlarged upon executing a recognizance, with sureties in the sum of five thousand dollars ($5,000.00), to the satisfaction of the clerk of this court, for his appearance to answer the judgment of the Supreme Court of the United States in this cause.

80 And afterwards, to-wit: on the 14th day — April A. D. 1905, a recognizance was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Recognizance.

THE UNITED STATES CIRCUIT COURT, Southern District of Ohio, Western Division, } ss:

We, John W. Ballman, and Robert J. O'Brien and George H. Yeager, jointly and severally acknowledge ourselves indebted to the United States of America in the sum of five thousand dollars, lawful money of the United States of America, to be levied on our and each of our goods, chattels, lands and tenements upon this condition.

Whereas the circuit court of the United States for the southern district of Ohio, western division, has allowed the appeal of said John W. Ballman to the Supreme Court of the United States from

the order of said circuit court dismissing his petition for a writ of *habeas corpus*, and has ordered that pending said appeal said Ballman may be enlarged upon executing a recognizance, with sureties, in the sum of five thousand dollars, to the satisfaction of the clerk of said court, for the appearance of said Ballman to answer the judgment of the Supreme Court of the United States on said appeal;

Now if the said Ballman shall appear in said circuit court to answer the judgment of the Supreme Court of the United States upon said appeal, and shall abide by and perform any judgment or order which may be rendered by said Supreme Court of the United States on said appeal, then this obligation shall be void; otherwise to remain in full force and virtue.

Witness our hands and seals this 14th day of April, 1905.

JOHN W. BALLMANN.
ROBERT J. O'BRIEN.
G. H. YEAGER.

Taken and approved this 14th day of April, 1905, before me.

[SEAL.]

B. R. COWEN,
Clerk U. S. C. C., S. D. O.,
By ROBERT C. GEORGI, Deputy.

81 THE UNITED STATES OF AMERICA, Southern District of Ohio, Western Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States, within and for the district and division aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above entitled cause as the same appears of record and on file in said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Cincinnati, Ohio, this 19th day of April A. D. 1905.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN, Clerk,
By ROB'T C. GEORGI,
Deputy Clerk.

82 THE UNITED STATES OF AMERICA, *ss:*

To The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, within thirty days, pursuant to an appeal allowed by the circuit court of the United States for the southern district of Ohio, western division, from an order of said court dismissing the

petition of John W. Ballman for a writ of *habeas corpus*, to show cause, if any there be, why the judgment in the said proceeding mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 14th day of April in the year of our Lord one thousand, nine hundred and five.

HORACE H. LURTON,
Circuit Judge.

Service acknowledged April 14, 1905.

SHERMAN T. McPHERSON,
United States Attorney, S. D. O.

[Endorsed:] United States circuit court, S. D. O., W. D. No. 6007. In the matter of John W. Ballmann. Citation on appeal. Filed April 14th, 1905. B. R. Cowen, clerk.

Supreme

83 [Endorsed:] No. —. United States circuit court, southern district of Ohio, western division. John W. Ballman, appellant, *vs.* The United States of America, appellee. Transcript. —— —— attorneys.

Endorsed on cover: File No. 19,727. S. Ohio C. C. U. S. Term No. 627. John W. Ballmann, appellant, *vs.* Vivian J. Fagin, United States marshal for the southern district of Ohio. Filed April 24th, 1905. File No. 19,727.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

Office Supreme Court U. S.
FILED
APR 24 1905
JAMES H. McKENNEY,
Clerk.

No. 627. 240

IN THE MATTER OF JOHN W. BALLMAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Brief for the Appellant on the Motion to Advance.

LAWRENCE MAXWELL, JR.,
THOMAS F. SHAY,
MILLER OUTCALT,
Counsel for Appellant.

WASHINGTON, D. C., JUDD & DETWEILER (INC.), PRINTERS. 15706

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. .....

IN THE MATTER OF JOHN W. BALLMAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Brief for the Appellant on the Motion to Advance.

This case involves new and important questions, not heretofore passed upon by the court, under the fourth amendment of the Constitution of the United States, which provides that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated," and under the fifth amendment, which provides that no person "shall be compelled in any criminal case to be a witness against himself," and under section 860 of the Revised Statutes, which provides that "no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any man-

ner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture."

The appellant claims that all of these fundamental guaranties have been ignored in the proceedings resulting in the commitment for contempt from which he seeks relief through this appeal. We cannot assent to the statement of the solicitor general that the facts are sufficiently shown in the opinions of Judge Lurton. What we conceive to be among the most important questions in the case are not even noticed, much less considered, in those opiuions, and the facts relating thereto are not stated.

If the case is advanced we request sufficient time, after the record shall have been printed, for the thorough preparation of the arguments and for the orderly exchange of briefs, in accordance with the rules of the court adopted for the purpose of securing careful preparation of all cases brought before the court, and especially those involving the construction or application of the Constitution of the United States.

Respectfully submitted.

LAWRENCE MAXWELL, JR.,
THOMAS F. SHAY,
MILLER OUTCALT,
Counsel for Appellant.

FILE COPY.

Office Supreme Court U. S.
FILED
MAY 8 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. ~~697~~ 240.

JOHN W. BALLMANN, APPELLANT,

vs.

VIVIAN J. FAGIN, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF OHIO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF FOR THE APPELLANT.

LAWRENCE MAXWELL, JR.,
THOMAS F. SHAY,
MILLER OUTCALT,
Counsel for the Appellant.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 15866

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 627.

JOHN W. BALLMANN, APPELLANT,

vs.

VIVIAN J. FAGIN, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF OHIO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF FOR THE APPELLANT.

Statement of the Case.

The appellant, John W. Ballmann, was committed for contempt by the district court of the United States for refusing to answer two questions propounded to him as a witness before the grand jury and for failing to produce a cash book before that body. He petitioned the circuit court for a writ of *habeas corpus* to release him from the custody of the marshal, which was granted. On final hearing on the petition, the answer of the marshal, the reply, and the evidence the petition was dismissed. From that order he now appeals to this court.

The following are the facts disclosed by the pleadings and the evidence in the circuit court, which embraced the record of the contempt proceedings in the district court, including all the evidence heard by that court, which had been duly preserved and made part of the record by bill of exceptions.

On April 7, 1905, Ballmann was served with a *subpœna duces tecum* issued on that day, commanding him to attend forthwith before the grand jury and to bring with him "cash book, ledger, letter-press copy books, and all sheets showing transactions under the name of A. Smith and A. Johnson during months of December, 1904, and January and February, 1905" (Exhibit F, Rec., 43).

On the same day the grand jury reported to the court that the witness had appeared, but had failed and refused to produce the books and papers called for by the subpœna (Rec., 18). Thereupon, on the same day, the court ordered the witness to produce all books and papers within his control (Rec., 19).

On the next day, April 8, the grand jury filed charges of contempt, in which they set forth that the witness on April 7, and also on April 8, willfully failed and refused to produce "a certain cash book in use in his business," which he was "required by said subpœna to produce," and that he had refused to answer two questions with reference to the meaning of certain figures on his ledger, and that he was therefore in contempt (Rec., 19).

On the same day the court heard the charges of contempt presented by the grand jury, upon evidence, and found that the witness was "guilty of contempt of the process and orders of this court, as charged in said information filed by said grand jury," and ordered him to "produce the said cash book and answer the questions set out in said charges of contempt at 12 o'clock noon Monday, April 10, 1905, before said grand jury, and in default thereof that he be committed to and confined within the jail of Miami county

at Troy, Ohio, until he complies with the orders of this court or is discharged by due process of law" (Rec., 20).

On the day appointed, April 10, the witness appeared before the grand jury and made the following answers (Rec., 22):

> "I have not now, and neither at the time of nor at any time since the service of the first subpœna upon me in this matter have I had, in my possession or under my custody or control the book referred to in the order of the court entered on April 8, 1905, or any book showing transactions under the name of A. Smith or A. Johnson, and am unable to produce the same.
>
> "I decline to answer the questions contained in said order of April 8, 1905, on the ground that it might tend to criminate me, and in this connection I produce a copy of a petition filed against me and others by Emanuel Oppenheimer in the court of common pleas of Hamilton county, being case No. 126,824, and I state that there are many other actions of the same kind pending against me."

The petition of Emanuel Oppenheimer, referred to in the foregoing answer of the witness, alleged that The O'Dell Company, one of the defendants named in the petition, "conducted a scheme of gambling known as a bucket shop" in the city of Cincinnati, and that the other defendants named in the petition, including the witness Ballmann, "are interested in said scheme of gambling as officers, stockholders, owners, venders and agents thereof, and otherwise." The petition sought to recover from the defendants, "by virtue of the statutes against gaming in the State of Ohio," the sum of $1,450.37, which the petition alleged that the plaintiff had lost "in and on account of the scheme of gambling maintained and conducted by the O'Dell Company," and exemplary damages in the sum of $500. Mr. Moulinier, assistant United States district attorney, was one of the counsel who signed the petition.

Thereupon, the grand jury having reported the answers

made by the witness, the court, without hearing evidence, entered the following judgment (Rec., 24):

> "The court, having heretofore ordered that John W. Ballmann appear before the grand jury for the April term (1905), and produce before said grand jury a cash book referred to in the order of the court, and to answer the questions propounded by the grand jury, as set out in its charge heretofore filed. And it appearing that the said John W. Ballmann has failed and refused to produce said book and has declined to answer said questions, it is now ordered that the said John W. Ballmann be taken into custody by the marshal and that he be confined and imprisoned within the jail of the county of Miami, at Troy, Ohio, in accordance with the former order of this court."

We have gone into details in the foregoing recital for the purpose of showing that the only charges preferred against Ballmann were those presented by the grand jury on April 7 and April 8, both of which were in writing, and that neither charged him with failing to produce any books or papers except as called for by the subpœna of April 7, which was confined to books and papers "showing transactions under the name of A. Smith and A. Johnson during months of December, 1904, and January and February, 1905" (Exhibit F, Rec., 43). On the hearing of the contempt charges not a scintilla of evidence was offered to show that the witness ever had in his possession or under his control any book or paper showing transactions with A. Smith or A. Johnson, or that he had any cash book in his possession or under his control after April 3, four days prior to the issue or service of the subpœna. The district court seems to have proceeded on the theory that in a criminal proceeding for contempt it devolves upon the defendant to prove that he is innocent and not upon the Government to prove that he is guilty.

Assignment of Errors.

We respectfully submit that the circuit court erred—

1. In not holding that the order of the district court committing the petitioner for contempt for refusing to answer the questions propounded to him by the grand jury, notwithstanding his claim that an answer thereto might criminate him, was in contravention of the fifth amendment of the Constitution of the United States and beyond the authority and jurisdiction of the court and void. We submit that the petitioner was not in contempt of court in refusing to answer the questions, but in the rightful exercise of privileges guaranteed to him by the Constitution of the United States.

2. In holding that an answer to the questions would not tend to criminate the petitioner.

3. In holding that the order of April 7, requiring the petitioner to produce before the grand jury all books and papers within his control, was not in contravention of the fourth and fifth amendments of the Constitution of the United States.

4. In holding that there was any legal evidence before the district court to show that the petitioner had been guilty of contempt in failing to produce a cash book before the grand jury or to justify his commitment on that account.

5. In holding that it was incumbent upon the petitioner to show in the contempt proceedings in the district court that the cash book, about which witnesses for the Government testified in that case, had been lost or destroyed after April 3. We submit that this ruling was in contravention of the fifth amendment, which declares that no person "shall

be compelled in any criminal case to be a witness against himself," and of the act of March 16, 1878, c. 37, 20 Stat., 30, which declares that in any proceedings in the courts of the United States against persons charged with the commission of crimes, offenses, or misdemeanors "the person so charged shall, at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him."

6. In treating as legal evidence in the contempt proceedings Dieterle's testimony therein concerning petitioner's evidence as a witness before the grand jury, and the pages from the petitioner's ledger, offered by the Government, and the evidence of witnesses for the Government concerning entries in the ledger, all of which evidence the district attorney offered and the court received in contravention of section 860 of the Revised Statutes of the United States, which provides that "no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture."

7. In dismissing the petition and remanding the petitioner to the custody of the marshal.

8. We also submit that the order of April 8, directing petitioner to produce a cash book before the grand jury and to answer questions with respect thereto and with respect to his ledger, was in contravention of the fourth and fifth amendments of the Constitution of the United States and of section 860 of the Revised Statutes of the United States, and void.

ARGUMENT.

I.

THE APPEAL WAS PROPERLY TAKEN TO THIS COURT.

Since the question whether the witness was required to answer the questions propounded to him by the grand jury involves the construction and application of the fifth amendment of the Constitution of the United States, and the claim was made in his petition for the writ of *habeas corpus* that his commitment in that respect and others was in contravention of the Constitution, the appeal from the order dismissing his petition was properly taken to this court under section 5 of the act of March 3, 1891.

Counselman *vs.* Hitchcock, 142 U. S., 547.
Horner *vs.* United States, No. 2, 143 U. S., 570.
Dimmick *vs.* Tompkins, 194 U. S., 540.
Craemer *vs.* Washington State, 168 U. S., 124, 127.

II.

IF BALLMANN WAS PROTECTED BY THE FIFTH AMENDMENT FROM ANSWERING THE QUESTIONS, THE ORDER COMMITTING HIM FOR REFUSING TO ANSWER IS VOID, AND HE IS ENTITLED TO BE RELEASED ON HABEAS CORPUS.

If he was entitled under the Constitution to refuse to answer on the ground that an answer might criminate him, he was not in contempt of court, but in the exercise of his constitutional right in refusing to answer, and the order committing him for contempt was in contravention of the Constitution and beyond the lawful authority and jurisdiction of the court, and void. It is well settled that a petitioner will be released on *habeas corpus* in such a case.

Ex parte Fisk, 113 U. S., 713.
Counselman *vs.* Hitchcock, 142 U. S., 547.

In *Ex parte* Fisk, 113 U. S., 713, the petitioner was released on *habeas corpus* because the order of the circuit court requiring him to submit to examination by his adversary in an action at law previous to the trial was held to be in conflict with section 861 of the Revised Statutes of the United States, which provides "that the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided." Mr. Justice Miller said, at page 726:

> "The circuit court was, therefore, without authority to make the orders for the examination of petitioner in this case, and equally without authority to enforce these orders by process for contempt. Its order fining him for contempt and committing him to the custody of the marshal was without jurisdiction and void, and the prisoner is entitled to his release."

And again, at page 718:

> "When however a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for contempt is equally void. It is well settled now, in the jurisprudence of this court, that when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of *habeas corpus*, discharge the prisoner."

The foregoing statement of the law is quoted with approval by Mr. Justice Matthews in *Ex parte* Ayers, 123 U. S., 443, 485, and other cases to the same effect are there cited. The precise point is covered by the case of Counselman *vs.* Hitchcock, 142 U. S., 547, where the petitioner was released on *habeas corpus* from a commitment for contempt for refusing to answer questions propounded by the grand jury in the face of his claim that an answer might criminate him.

III.

THERE WAS NO EVIDENCE AND NO CIRCUMSTANCES BEFORE THE DISTRICT COURT TO JUSTIFY IT IN REJECTING THE SWORN STATEMENT OF THE WITNESS THAT AN ANSWER TO THE QUESTIONS MIGHT CRIMINATE HIM.

It is only where it is clear that an answer cannot possibly tend to criminate the witness and that his refusal to answer is therefore a fraudulent device to protect third parties that the court can disregard his sworn statement that an answer may criminate him and compel him to answer. The witness is not obliged to say of what offense he has been guilty or in what way an answer might lead to his detection or conviction, for that would defeat the very object of the privilege. The district court did not interrogate the witness or take any other steps to test the integrity of his claim of privilege, but summarily rejected it, notwithstanding his sworn statement that an answer might tend to criminate him, and, in the face of circumstances, to which we shall advert later, showing that the witness was in peril of prosecutions for perjury, for contempt of court, and for conducting a bucket shop, in all of which answers to the questions propounded by the grand jury or the production of his books might seriously implicate him.

In People *ex rel.* Lewisohn *vs.* O'Brien, 176 N. Y., 253 (1903), the public prosecutor had presented to the court of special sessions an information charging one Canfield with conducting a gambling-house at No. 5 East 44th street, in the city of New York, between January 1, 1902, and December 1, 1902. Lewisohn was subpœnaed as a witness, and after stating that he had known the defendant Canfield four or five years and that he had not been on the premises No. 5 East 44th street prior to December, 1899, was asked the following questions:

> "Q. Have you ever been in there in your life? Have you ever been in the premises No. 5 East 44th street in the city and county of New York?"

The witness refused to answer the questions on the ground that they might tend to criminate him, although the district attorney promised him immunity, and he was committed for contempt. The court of appeals unanimously affirmed an order of the appellate division discharging him from custody on writs of *habeas corpus* and certiorari, saying, at page 268:

> "It is quite impossible for the court to say to what extent the witness, if he answered, would be criminated or placed in jeopardy. He might be subjected to proceedings involving penalty or forfeiture; he might be tried and convicted as a common gambler, which is declared by statute to be a felony. All this might be accomplished without using his evidence against him if given herein."

The court recognized that cases might arise in which the mere assertion of the witness that an answer might criminate him ought not to be accepted as conclusive, saying, at page 266:

> "Where the court can see that the refusal to answer is a mere device to protect a third party, and that the witness is in no possible danger of disclosing facts that would lead to his own indictment and conviction, an answer may be insisted on."

The court added, referring to Chief Justice Marshall's decision in Burr's case:

> "It rests with the witness whether he will answer or not, except, as we have pointed out, where the refusal is clearly a fraudulent device to protect a third party" (176 N. Y., 267).

In People *ex rel.* Taylor *vs.* Forbes, 143 N. Y., 219 (1894), the relator was released by the court of appeals from a com-

mitment for contempt for refusing to answer certain questions while testifying before the grand jury, which was investigating outrages perpetrated in connection with the annual banquet of the freshmen class of Cornell University on the evening of February 20, 1894. While the banquet was in progress a quantity of chlorine gas, of poisonous power, was injected into the dining hall and the adjoining kitchen, causing the death of a colored servant in the kitchen and the serious illness of many of the freshmen. The result was produced by placing two jugs in a room just below the dining hall, containing the essential chemicals and substances for the generation of the gas, which was conducted into the kitchen and dining hall by means of rubber tubes placed over the mouth of the jugs and passed upward through holes for that purpose bored in the ceiling and floor above.

The witness, who was a member of the sophomore class, testified in the boadest terms before the grand jury that he had no connection whatever with the transaction. He was then asked if he knew where the jugs were purchased, who purchased them, when purchased, and to whom they were delivered after they were purchased, but declined to answer any of the questions, claiming that he might criminate himself. The lower court held that this claim of privilege was inconsistent with his voluntary statement to the grand jury that he had no connection with the transaction and was interposed as a mere pretext for shielding his friends and associates, and committed him. The court of appeals, in reversing the order and discharging the prisoner, said, at page 231:

> "The weight of authority seems to be in favor of the rule that the witness may be compelled to answer when he contumaciously refuses, or when it is perfectly clear and plain that he is mistaken, and that the answer cannot possibly injure him, or tend in any degree to subject him to the peril of prosecution. But the courts have recognized the impossibility in most cases of anticipating the effect of the answer. Where it is not so perfectly evident and manifest that the

answer called for cannot incriminate, as to preclude all reasonable doubt or fair argument, the privilege must be recognized and protected (Janvrin *vs.* Scammon, 29 N. H., 280)."

And again, page 230 :

"The witness who knows what the court does not know, and what he cannot disclose without accusing himself, must in such cases judge for himself as to the effect of his answer, and if, to his mind, it may constitute a link in the chain of testimony, sufficient to convict him, when other facts are shown, or to put him in jeopardy, or subject him to the hazard of a criminal charge, indictment or trial, he may remain silent. While the guilty may use the privilege as a shield it may be the main protection of the innocent, since it is quite conceivable that a person may be placed in such circumstances, connected with the commission of a criminal offense, that if required to disclose other facts within his knowledge he might, though innocent, be looked upon as the guilty party."

In Janvrin *vs.* Scammon, 29 N. H., 280, 290, the court said :

"The privilege is personal to the witness, and when a question is put, he in the first place decides for himself whether the answer will criminate him, and whether he will avail himself of his privilege. The court, also, will frequently interfere and inform the witness of his privilege, when they see that the question may lead to an answer tending to criminate him. When he places himself upon his privilege he will be protected, unless the court can see from the circumstances of the case that he is in error, or that it is a mere pretext on the part of the witness to avoid answering, and that his answer cannot, from the nature of things, criminate him.

"It must be manifest, however, that in many cases it will be impossible for the court to anticipate what effect the answer may have, and wherever they cannot see that he will not be criminated the privilege will be recognized and protected (State *vs.* Foster, 3 Foster's Rep., 348, and authorities there cited)."

In Counselman *vs.* Hitchcock, 142 U. S., 547, 580, Mr. Justice Blatchford correctly said that in Temple *vs.* Commonwealth, 75 Va., 892, the court of appeals of Virginia held that—

> "The great weight of authority in the United States was in favor of the rule that, when a witness on oath declared his belief that his answer would tend to criminate himself, the court could not compel him to answer, unless it was perfectly clear from a careful consideration of all the circumstances in the case that the witness was mistaken and that the answer could not possibly have such a tendency."

In *In re* Kantner, 117 Fed., 356, bankrupts were excused on an application to commit them for contempt for failing to obey an order of the court requiring them to file schedules and turn over to the receiver all their books of account, records, papers, etc., kept in their business on the claim that they might thereby incriminate themselves, and they showed that they were under indictments in a State court charging them with the crime of fraudulently removing, secreting, and disposing of property and with the crime of grand larceny in obtaining goods under false pretenses. The creditors insisted that it was for the court to determine whether the evidence will criminate them, and that the bankrupts cannot be permitted to judge for themselves, thus depriving their creditors of an opportunity to ascertain the condition of the estate, and it was urged that schedules, books, etc., would not furnish incriminating evidence.

Adams, D. J., said :

> "In a case where it clearly appears to the court that a party from whom evidence is sought contumaciously or mistakenly refuses to furnish that which cannot possibly injure him, he will not be permitted to shield himself behind the privilege, but generally the party best knows what he cannot furnish without accusing himself, and where it is not perfectly evi-

dent and manifest that the evidence called for will not be incriminating, the privilege must be allowed. Here the inculpated parties explicitly depose that the books, &c., sought to be obtained would furnish evidence against them, and so far from being able to say that it clearly appears such would not be the case, I should be inclined to believe that it would, from the nature of the evidence which the books &c. would in all probability furnish."

In Chamberlain *vs.* Willson, 12 Vt., 491, 494, Redfield, J., said:

"If he informs the court, upon oath, that he cannot testify without criminating himself, the court cannot compel him to testify, unless they are fully satisfied such is not the fact, *i. e.*, that the witness is either mistaken or acts in bad faith, in either of which cases the court should compel the witness to testify."

In Warner *vs.* Lucas, 10 Ohio, 336, 338, the court, after referring to Chief Justice Marshall's decision on Burr's trial, said:

"The rule had before been laid down in general terms, that the witness is himself to be the judge, and it is difficult to perceive how the court can be the judge, if the bearing of the testimony which is sought to be disclosed is a secret locked up in the bosom of the witness, and if to give a reason why he declined to testify, should have the effect of partially revealing that secret.

"The court can only be enabled to judge, when it understands the situation of the witness. To understand that, may require a disclosure from the witness of his reasons for withholding his testimony, and yet in giving these reasons, he may furnish a necessary link in the chain of testimony against himself. The rule laid down in the case of Col. Burr, therefore, must not be considered as one of universal application, because there may be cases in which the court are absolutely unable to judge.

"But the rule was undoubtedly correct in that particular case; for the witness did voluntarily give his reasons for refusing to testify. He was desired to decipher a certain letter, and the witness was asked if he understood the cipher. He was afraid of being implicated in the misprision of treason which that knowledge might imply, but inasmuch as his present knowledge, his knowledge at the trial did not necessarily imply that he was before acquainted with the meaning of the cipher, and the contents of the letter, so as to involve him in the guilt of knowing and concealing the treason, it was held that he might testify. The court did not decide that he must testify. A case was supposed in which the witness might safely answer the question proposed, without undertaking to decide whether that was the case of the witness.

"The Chief Justice, therefore, very properly limits the generality of the rule which he before laid down. He says: 'If the answer *may* disclose a fact, which forms a necessary and essential link in the chain of crime he is not bound to answer it.' 'In such a case, the witness must himself judge what his answer will be, and if he say on oath, that he cannot answer without accusing himself, he cannot be compelled to answer.' That is, inasmuch as it is impossible for the court thoroughly to understand the situation of the witness, or to comprehend the bearing which his testimony may have on his past actions and conduct, he must necessarily, in the last resort, be the judge himself what will be the effect of that testimony.

"And thus, the rule laid down on that celebrated trial does not, after all, differ materially from the rule as before understood. To make the witness the judge what will be the effect of his answers, might seem to be fraught with great danger and inconvenience, but in reality it has none of these inconveniences. It happens in this, as in a great many other instances, that as soon as a theoretical rule is reduced to practice it becomes perfectly harmless. For a witness to refuse to testify because his testimony may criminate him, is at once to pronounce his own turpitude. Not one man in a thousand would, without reason, venture upon so perilous a situation. The mischief to

> the witness is so enormous as to counteract the mischief on the other side and to render the rule in its operation both a wise and salutary one."

Lawson *vs.* Boyden, 160 Ill., 613, states the rule on the burden of proof in the case of claim of privilege. It was there held that a witness cannot be deprived of his privilege, on the ground that the offense is barred by limitation, unless it appears *affirmatively* that no prosecution is pending against him, citing 29 Am. & Eng. Ency. of Law, p. 842; Bank *vs.* Henry, 2 Denio, 156; Henry *vs.* Bank, 1 N. Y., 87; Southern Ry. News Co. *vs.* Russell, 91 Ga., 808; Marshall *vs.* Riley, 7 Ga., 372; Matter of Tappan, 9 How. Pr., 395.

IV.

THE EVIDENCE BEFORE THE DISTRICT COURT SUGGESTED THAT AN ANSWER TO THE QUESTIONS OR THE PRODUCTION OF HIS BOOKS MIGHT IMPLICATE THE WITNESS IN SEVERAL WAYS.

1. The witness was already charged with criminal contempt for having failed to produce a cash book before the grand jury on the day before and on the morning of the same day, and was subject to be further prosecuted, if he had any books in his possession, for disobedience of the sweeping order of April 7, which directed him to produce all books. The court cannot say that an answer to the questions propounded by the grand jury might not lead directly or indirectly to his conviction for having withheld some book. The production of a cash book would certainly have led to that result. An affirmative answer to the questions identifying the figures on the ledger with a cash book might have led to that result. The witness could not, therefore, be required to answer the questions or to produce a cash book without infringing his rights under the fifth amendment,

and the order of the court committing him for failing to do so was beyond the power of the court and void.

2. Dieterle, foreman of the grand jury, disclosed to the court that Ballmann had testified before the grand jury that he had not used a cash book in his business during December, 1904, and January, February, March, and April, 1905 (Rec., 27). An affirmative answer to the questions propounded by the grand jury, or the production of a cash book, might, therefore, have led to the indictment and conviction of the witness for perjury.

The circuit court held that a witness who has committed perjury on April 7 or 8 is bound on April 10 to answer a question which might lead to his conviction, expressing the opinion that any other rule "would permit every witness to close his mouth when he found himself about to be cornered." The witness is permitted to close his mouth, not because he is about to be cornered, but because an answer might criminate him, and he is entitled to remain silent whenever that peril presents itself.

It was on April 8, during the hearing of the contempt charges, that Ballmann was first advised of the claim of the Government that he had testified falsely before the grand jury with respect to the use of *any* cash book in his business in December, 1904, and the following months, and that he was therefore in peril of being indicted for perjury. Immediately upon being advised of this claim of the Government he set up his privilege, and was entitled to do so. He does not admit that he testified falsely before the grand jury, but the Government insists that he did, and he is in peril. He does not admit that he testified before the grand jury, that he did not use a cash book in his business in December, 1904, and January and February, 1905, but the Government claims that he did so testify and that such is the meaning of Dieterle's testimony (Rec., 27). The solicitor general says in his brief at page 37:

> "He [Ballmann] broadly denied in reality keeping *any* cash book."

And at page 47:

> "The Government offered evidence tending to show that he [Ballmann] had denied wholly having a cash book."

Ballmann was therefore distinctly advised by the course and character of the Government's evidence at the hearing on April 8, and then for the first time, that he was in peril of prosecution for perjury, and it was his clear duty to himself and to his wife and children, and his right under the Constitution, to decline, when he was brought before the grand jury on the following Monday, April 10, to answer any question which might implicate him in that charge.

The solicitor general suggests that the witness may not be prosecuted for perjury if he answers the questions and produces the cash book, but he is not obliged to take that chance. Nothing but absolute immunity from prosecution, which the solicitor general does not offer and is not authorized to grant, can deprive the witness of his privilege, as was expressly decided in Counselman *vs.* Hitchcock.

The solicitor general also makes the novel suggestion that we are estopped from saying that silence may have been necessary to protect the witness from indictment and conviction for perjury, because in his pleadings in this case he does not admit that he is guilty of perjury. A witness who claims the privilege of silence is not required to admit that he is guilty. The protection of the Constitution is for the innocent as well as for the guilty, and he may require and claim and be accorded protection from the peril of indictment, although protesting his innocence, as was held in People *vs.* Forbes, 143 N. Y., 219.

3. Oppenheimer's petition filed in the court of common pleas, and other similar suits pending against the witness, showed

that he was being sued for penalties under the statutes of Ohio against gambling and bucket shops, and that he was charged in verified petitions with being engaged in an unlawful business. The court cannot say that an answer to the questions propounded by the grand jury or the production of his books might not lead directly or indirectly to the witness' conviction under the laws of Ohio. The production of his books and the explanation of entries thereon would naturally lead to that result, if, in fact, the business in which he was engaged and which the books recorded was illegal.

A witness or party in a Federal court is entitled to protect himself against self-crimination under a law of the State in which the court is sitting.

United States *vs.* The Saline Bank, 1 Pet., 100.

The following is the statute of Ohio against bucket shops, passed February 7, 1899, 86 Ohio Laws, 12 (3 Bates' Annotated Ohio Statutes, 4th ed., p. 3350):

> "(6934*a*–1) SEC. 1. That it shall be unlawful for any corporation, association, chamber of commerce, board of trade, copartnership or person to keep or cause to be kept within this State any bucket shop, office or other place wherein is conducted or permitted the pretended buying or selling of the shares of stock or bonds of any corporation, or petroleum, cotton, grain, provisions or other produce, either on margins or otherwise, without any intention of receiving and paying for the property so bought, or of delivering the property so sold; or wherein is conducted or permitted the pretended buying or selling of such property on margins, or when the party buying any of such property, or offering to buy the same, does not intend actually to receive the same if purchased, or to deliver the same if sold, and the keeping of all such places and any such pretended buying or selling are hereby prohibited. Any corporation or person, whether acting individually or as a member, or as an officer, agent or employé of any corporation, association or copartnership, who

shall be guilty of violating this section shall, upon conviction thereof, be fined in any sum not exceeding five hundred dollars ($500.00) nor less than two hundred dollars ($200.00) and any person or persons who shall be guilty of a second offense under this statute, in addition to the penalty above prescribed, shall, upon conviction, be imprisoned in the county jail for the period of six months, and if a corporation, shall be liable to forfeiture of its charter; and the continuance of such establishment, after first conviction, shall be deemed a second offense. And the foregoing provisions shall apply to any 'bucket shop,' office or other place of business within this State, conducted in pursuance of or under any agreement or arrangement with any corporation, chamber of commerce, board of trade, association, copartnership, or person within this State, who has or may have leased, or who has or may have the control or use of any line or wire of any telegraph or other means of communication with such 'bucket shop,' office or other place of business within this State, and to all persons in any way employed or engaged in maintaining and carrying on such wagering business therein, or in any connection therewith; and no person within this State shall employ or use such telegraph, or other means of communication to transmit information to such non-resident of this State of any such wagering transaction or thing prohibited by this act, and the keeping of all places hereinbefore mentioned is hereby prohibited, and such non-residents of this State, as shall cause to be violated within this State the foregoing provisions in relation to such non-residents, shall be deemed guilty of a misdemeanor committed within this State, and shall be fined or imprisoned as hereinbefore provided in this section."

There is also a general statute against schemes of chance, viz:

"SEC. 6931. Whoever, publicly or privately, as owner or agent, establishes, opens, sets on foot, carries on, promotes, makes, draws, or acts as 'backer'

> or 'vender' for or on account of, or is in any way concerned in, any lottery, 'policy,' or scheme of chance, of any kind or description, by whatever name, style, or title the same may be denominated or known, whether located, or to be drawn, paid or carried on within or without this State, or by any of the means aforesaid exposes or sets to sale anything of value, shall be fined not more than five hundred nor less than fifty dollars, and imprisonment not more than ninety nor less than ten days."

Sections 4271–4276 provide for the recovery of money lost in schemes of chance and penalties, and for the liability as principal of persons leasing premises to be used for such purposes. The supreme court of Ohio has decided that suits for the recovery of money under these statutes are actions for penalty or forfeiture (Cooper *vs.* Rowley, 29 Ohio St., 547).

4. The solicitor general has favored us with the statement outside of the record that the grand jury were investigating the theft or embezzlement of money from a national bank, that an employé of the bank was suspected, and that they were inquiring about his speculative dealings under the fictitious names of A. Smith and A. Johnson with Ballmann. Accepting this statement, it is possible that Ballmann, in the course of his examination by the grand jury, discovered that they were in fact investigating him, for section 5209 of the Revised Statutes of the United States makes it a crime for any one to aid or abet any officer, clerk, or agent of a national bank in any violation of the section. A person who assisted the speculations of a national bank clerk, with knowledge that he was using funds of the bank, might himself be liable.

All that this court knows judicially or that the circuit court knew from the record with respect to the deliberations of the grand jury is that they were investigating some offense against the laws of the United States; whether on the part of Ballmann or on the part of Ballmann and persons with

whom he had speculative transactions, or on the part of other persons, is not known. Ballmann was ordered to produce all books and papers in his control and to answer questions with respect thereto for the purpose of fastening criminal responsibility, it may be, upon himself. If this was the course of the examination the witness was protected by the Constitution from answering or producing books. He was equally protected if the disclosures related to offenses entirely distinct from those which the grand jury was investigating. He was not obliged before that body to make any answer that might tend to convict him of *any* offense under the laws of the United States or of the State of Ohio.

V.

IT IS IMMATERIAL THAT THE ANSWER OF THE WITNESS COULD NOT BE USED AGAINST HIM DIRECTLY. IT IS ENOUGH THAT IT MIGHT LEAD TO INCRIMINATING DISCLOSURES.

This was the point decided in Counselman *vs.* Hitchcock, 142 U. S., 547, and in the cases in the State courts approved in that opinion.

In Emery's case, 107 Mass., 172, the court held that a statute similar to section 860 of the Revised Statutes of the United States did not affect the constitutional right of the witness to remain silent, because his disclosures, while not receivable in evidence against him, "might furnish the only means of discovering the names of those who could give evidence concerning the transaction, the instrument by which a crime was committed, or even the *corpus delicti* itself." The court held that the Constitution "protects a person from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him."

In Counselman *vs.* Hitchcock, 142 U. S., 547, 585, the court adopted the foregoing words in declaring the proper construction of the fifth amendment. The court also said at page 564 that section 860 of the Revised Statutes of the United States did not fully protect the witness because it "would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

At page 586 Mr. Justice Blatchford said:

> "Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of crime, and of sources of information which may supply other means of convicting the witness or party."

At page 562 he said of the fifth amendment:

> "The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he had himself committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."

In Burr's trial, 1 Burr's Trial (Robertson's ed.), 244 (Fed. Cas. 14692*e*), Chief Justice Marshall said:

> "Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule, that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself; and to every effectual

purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself, would most obviously be infringed, by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime that is punishable by the laws."

VI.

THERE WAS NO LEGAL EVIDENCE TO SUSTAIN THE CONVICTION FOR CONTEMPT FOR FAILING TO PRODUCE A CASH BOOK.

If this be true the petitioner is entitled to be discharged on *habeas corpus*. It was on that ground that Watts & Sachs were discharged (190 U. S., 1, 35). The chief justice said that "there was some conflict of evidence as to Sachs' participation," but that "there was no legal evidence to sustain these convictions for contempt and the order in each case must be petitioner discharged." Mr. Justice Harlan, concurring, said (p. 36):

> "I concur in that part of the opinion of the court which shows that there was no evidence whatever upon which to base a judgment for contempt against Watts & Sachs, or either of them. That view of the evidence is sufficient to dispose of the case without reference to any other question arising on the record. My concurrence in the judgment discharging the petitioners is solely on the ground just stated."

The testimony of Ballmann's employés before the district court showed that he had used a cash book in his business up to April 3, but there was no evidence that it contained accounts of transactions with A. Smith or A. Johnson, or that it was in existence after April 3.

In order to convict the defendant it was necessary for the Government to prove that a book answering the description of the subpœna (containing transactions with A. Smith or A. Johnson) was in existence and under his control on April 7. There was no evidence of this fact or of the existence or possession of any cash book after April 3.

In Iasigi *vs.* Brown, 1 Curtis, 401, Mr. Justice Curtis said that an applicant who seeks an order for the production of a paper under section 724 of the Revised Statutes of the United States must show that the paper exists, and that it is in the possession or control of the other party. The rule in chancery was that production was not ordered unless possession was admitted in case of a party or conclusively proved in other cases.

Langdell Eq. Pl., s. 211.
Hall *vs.* Young, 37 N. H., 134, 142.
Baggott *vs.* Goodwin, 17 Ohio St., 76, 81.

In Hall *vs.* Young, *supra*, the court, speaking of *subpœnas duces tecum*, said :

> "But before the court is to be called upon to make a peremptory order that the document be produced, it must be shown *conclusively* that the witness has the power to comply with it. It is not sufficient that there is such evidence as would be competent to be submitted to a jury upon the question. Evidence may have a legal tendency to establish the fact that the witness has the document in his possession, *and yet fall far short of that conclusive character which will warrant the court in adjudging him guilty of contempt, in not complying with the order to produce it.*"

Since the proceeding in the district court was a criminal case, the Government was bound to establish the guilt of the defendant beyond a reasonable doubt.

Bessette *vs.* W. B. Conkey Company, 194 U. S., 324.
New Orleans *vs.* Steamship Company, 20 Wall., 387.

This rule required proof beyond reasonable doubt that the particular cash book, for failing to produce which the petitioner has been committed, was in existence and under his control on April 7. That is not established by proving the existence of *a* cash book on April 3.

In Bullock Electric and Mfg. Co. *vs.* Westinghouse Electric and Mfg. Co., 129 Fed., 105, 106 (C C. A., 6th cir.), Lurton, C. J., said:

> "The proceeding to punish for a contempt is in its nature a criminal proceeding, whether the result be partially remedial or not, and the same rules prevail which govern in the trial of indictments, the defendant being entitled to the benefit of any reasonable doubt" (Accumulator Co. *vs.* Consolidated Electric Co., 53 Fed., 793; *In re* Acker, 66 Fed., 291; Harwell *vs.* State, 10 Lea, 544; 4 Ency. Pl. and Pr., 768 *et seq.*; U. S. *vs.* Jose, 63 Fed., 951).

The presumption of the innocence of the accused has relation to every fact that must be established to prove guilt beyond a reasonable doubt.

Kirby *vs.* United States, 174 U. S., 55.

The presumption is evidence in favor of the accused.

Coffin *vs.* United States, 156 U. S., 432.

The nature of the case and the amount and character of the proof required must be considered in determining whether there was any legal evidence to justify the conviction for failing to produce a cash book. We submit that there was none. The district court and the circuit court have

allowed conjecture and suspicion to take the place of proof. Their error is similar to that which was so severely condemned in Chaffee & Co. *vs.* United States, 18 Wall, 516.

That was an action for penalties against distillers for alleged frauds in failing to pay duty on the full amount of whiskey in their possession. The error of the trial court is thus disposed of in the opinion of Mr. Justice Field, commencing at page 543:

> "It remains to consider the exceptions taken to the charge to the jury. These are sixteen in number and are directed principally to the error which pervades the whole charge, consisting in the instruction reiterated in different forms, that after the Government had made out a primâ facie case against the defendants, if the jury believed the defendants had it in their power to explain the matters appearing against them, and did not do so, all doubt arising upon such primâ facie case must be resolved against them. As we have stated, the defendants had paid taxes on over six thousand barrels of whiskey manufactured by them between the dates mentioned in the declaration. Nearly this number was traced to consignees. By the canal certificates and railroad receipts the Government had shown in that way a transportation from Tippecanoe of over two thousand barrels more. It was admitted that no charge was to be made to the defendants for any amount they had on hand in October, 1865, although the declaration charges the possession, with the unlawful purpose, to have been between February 1st, 1865, and September 1st, 1866. The defendants endeavored to show that they had on hand at that time between two and three thousand barrels, and for that purpose called in a large number of witnesses, neighbors and others, who had visited the distillery during that period. The estimates of the amount by these witnesses differed materially, being made from recollection. The defendants were present at the trial but were not called as witnesses. It was proved that they kept books, consisting of day books, journals, and ledgers.
>
> "Now the court instructed the jury that it was a

rule, without exception, that when a party has proof in his power which, if produced, would render material facts certain, the law presumes against him if he omits to produce it and authorizes a jury to resolve all doubts adversely to his defense; that although the case must be made out against the defendants beyond all reasonable doubt in this case as well as in criminal cases, yet the course of the defendants may have supplied in the presumptions of law all which this stringent rule demanded. 'In determining, therefore, in the outset,' said the court to the jury, 'whether a case is established by the Government, you will dismiss from your minds the perplexing question whether it is so made out beyond all doubt. It need not, in the exigencies of this case, be so proved in order to throw the burden of explanation upon the defendant, if from the facts you believe he has within his reach that power. In the end, all reasonable doubt must be removed, but here, at this stage, you need say only, is the case so far established as to call for explanation.' * * * 'If, then, you conclude that, unexplained and uncontroverted by any testimony, the opening proof would enable you to find against the defendants for the claim of the Government, or any material part of it, you will then take up their testimony in view of the principle' stated, that of presuming against a party, who fails to produce proofs in his possession. And again, the court instructed the jury that the law presumed that the defendants kept the accounts usual and necessary for the correct understanding of their large business and an accurate accounting between the partners, and that the books were in existence and accessible to the defendants unless the contrary were shown, and then said to the jury, 'If you believe the books were kept which contained the facts necessary to show the real amount of whisky in the hands of the defendants in October, 1865, and the amount which they had sold during the next ten months, or that the defendants, or either of them, could by their own oath resolve all doubts on this point; if you believe this, then the circumstances of this case seem to come fully within this most necessary and beneficent rule.'

> "The purport of all this was to tell the jury that although the defendants must be proved guilty beyond a reasonable doubt, yet, if the Government had made out a prima facie case against them, not one free from all doubt, but one which disclosed circumstances requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors; their silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt. *In other words, the court instructed the jury, in substance, that the Government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and if they did not they were guilty beyond a reasonable doubt. We do not think it at all necessary to go into any argument to show the error of this instruction.* The error is palpable on its statement. All the authorities condemn it."

We respectfully submit that the district court and the circuit court fell into the same error in this case. The circuit court said:

> "Its loss or disappearance was not claimed by the witness (the petitioner) nor by any of the witnesses examined in respect to it. It had disappeared from the office desk, and in the light of this evidence, most of it unwilling evidence, from those associated with the petitioner in business, such a book was in his office upon April 3, and had been there for an indefinite time prior thereto. The circuit court might well assume that this book was still in the possession or under the control of Mr. Ballmann. It certainly made a case in which he was called upon to show, if such was the fact, that the book described in the evidence had been lost or destroyed after the date when it was last seen in Mr. Ballmann's possession or in his office."

The witnesses referred to by the circuit court, although employés of the defendant, were not authorized to claim any-

thing on his behalf. They were before the court only in the capacity of witnesses called by the Government. Nor was the defendant a witness or claiming anything, except that he was not guilty. He was not called upon to show anything until the Government had established his guilt, not by presumption or conjecture, but by proof beyond a reasonable doubt of every fact necessary to establish his guilt.

The solicitor general offers a new principle of procedure in criminal cases when he says at page 37 of his brief:

> "He [Ballmann] should have explained what had become of the book or why he did not know what has become of it."

The following is the reason given by the district court for reaching its conclusion:

> "Mr. Ballmann does not testify before the court, and all we have is his general statement before the grand jury that no such book ever existed. He does not come here and say that the book did exist and that he destroyed it, or that somebody had stolen it, or that it had mysteriously disappeared, without fault upon his part, and that he is unable to produce it here. He says nothing of that kind, and I feel constrained to say, upon this evidence, that that book today is within his control, if not in his actual possession."

The court overlooked the fact that it was forbidden by the act of March 16, 1878, c. 37, 20 Stat., 30, from indulging any presumption against the defendant because he did not testify, and that the court was precluded by section 860 from using against him his testimony before the grand jury that he never used a cash book. The district court found that he was guilty because he did not prove that he was innocent.

VII.

TESTIMONY BEFORE THE DISTRICT COURT WHICH WAS NOT LEGAL EVIDENCE.

Section 860 of the Revised Statutes of the United States provides that—

> "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture."

It was in violation of this statute that the district attorney offered, and the district court received over the defendant's objection, Foreman Dieterle's evidence that Ballmann had testified before the grand jury that he had not used a cash book in his business (Rec., 27). This evidence was not received for the purpose of proving that Ballmann had failed to produce a cash book. Dieterle had already testified to that fact (Rec., 27). It was offered, and improperly received, for the purpose of comparing Ballmann's testimony before the grand jury with the testimony of his clerks at the trial concerning the existence and use of a cash book, in order to discredit him and to show that he was guilty of subterfuge. But his testimony before the grand jury could not be used for that purpose under section 860. That section forbade the use of his ledger, obtained from him under the order of April 7, or of the testimony of witnesses improperly offered by the Government concerning entries thereon.

In Tucker *vs.* United States, 151 U. S., 164, 168, it was held that "discovery" or "evidence," within the meaning of section 860, includes facts or papers which a witness is compelled to produce or disclose by subpœna, interrogatory, or

other judicial process, and that the section is conceived in the same spirit as the fifth amendment.

Eliminating the foregoing illegal evidence, the only legal evidence before the court was that a cash book not shown to contain transactions with A. Smith or A. Johnson was in existence four days before the issue or service of the subpœna. This was no evidence on which to commit a man to prison. That could be done only on proof beyond a reasonable doubt that a book called for by the subpœna was in existence and under the defendant's control on April 7.

We call attention also to the course of the district attorney in offering evidence, clearly incompetent, of what his witnesses had testified before the grand jury concerning Ballmann's books (Rec., 30, 34, 35, 36, 37, 39). The court not only received this testimony, but itself put the following question to the Government's witness Kramer (Rec., 36):

"What did you tell the grand jury?"

VIII.

THE ORDER OF APRIL 7, DIRECTING BALLMANN TO PRODUCE ALL BOOKS AND PAPERS IN HIS CONTROL, WAS REPUGNANT TO THE FOURTH AMENDMENT.

In *Ex parte* Brown, 72 Mo., 83, it was held that a *subpœna duces tecum* to a telegraph operator to produce, before a grand jury, all dispatches passing between eight persons named in the subpœna within fifteen months last past, was illegal under the twenty-third section of the bill of rights of Missouri, which declares "that the people ought to be secure in their persons, papers, houses and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, can issue without describing the place to be searched or the thing to be seized, as nearly as may be, nor without probable cause, supported

by oath or affirmation," and that the operator was not bound to obey it. He was released on *habeas corpus* by the unanimous judgment of the supreme court of Missouri from the commitment for contempt, which the criminal court had imposed, for refusing to obey the subpœna.

Henry, J., delivering the opinion of the court said, at page 94:

> "To permit an indiscriminate search among all the papers in one's possession for no particular paper, but some paper, which may throw some light on some issue involved in the trial of some cause pending, would lead to consequences that can be contemplated only with horror, and such a process is not to be tolerated among a free people. A grand jury has a general inquisitorial power. They may ask a witness summoned before them, without reference to any particular offense which is a subject of inquiry, what he knows touching the violation of any section of the criminal code. Give such a body, in addition, the power to search any man's papers for evidence of some crime committed, and you convert it into a tribunal which would soon become as odious to American citizens as the Star Chamber was to Englishmen, or the Spanish Inquisition to the civilized world."

In *Ex parte* Clarke, 126 Cal., 235 (1899), it was held that an order in a civil suit on the secretary of the corporation defendant to produce its ledger, journal, stock ledger, stock journal, stock certificate book, and petty cash book, without any preliminary showing that they contained material evidence, was void under a provision of the constitution of California similar to the fourth amendment of the Constitution of the United States, and the secretary was discharged on *habeas corpus* from a commitment for disobeying the order. The court said that—

> "it was in effect a general omnibus order for the production of all defendant's books, which has always been held to be unauthorized."

The court said at page 238:

> "The privacy of private books and papers is not only of inestimable value to the owner on account of various personal and sentimental reasons, but is of the greatest value also from mere business considerations; the exposure of a man's methods of business would frequently be highly injurious to him, and, although really solvent, might produce such embarrassments as would ruin him. His right, therefore, to the sole possession and knowledge of his private books and papers is not to be violated, except where the power to do so clearly appears."

IX.

THE ORDER OF APRIL 8, REQUIRING THE DEFENDANT TO PRODUCE A CASH BOOK, WAS UNLAWFUL UNDER THE FOURTH AND FIFTH AMENDMENTS.

If that order, as the circuit court held, refers to a cash book other than one containing transactions with A. Smith or A. Johnson, obedience to it would necessarily extort from Ballmann evidence to convict him of disobedience of the sweeping order of April 7, and would subject him to the peril of punishment for such disobedience. The order was therefore an unreasonable seizure in contravention of the fourth amendment, within the principle of the decision in Boyd *vs.* United States, 116 U. S., 616, and unlawful under the fifth amendment, because it compelled the witness, who had then also become a defendant in a criminal proceeding for contempt, to furnish evidence against himself.

In Boyd *vs.* United States, 116 U. S., 616, it was held that an order of court may amount to a seizure within the meaning of the fourth amendment. The limitation upon the reasonableness of the seizure is indicated by the declaration in the amendment that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and

particularly describing the place to be searched, and the persons or *things to be seized.*"

Whenever a witness is excused from giving testimony upon the ground that an answer might criminate him, he cannot be compelled to produce books or papers which would have that effect.

Lawson *vs.* Boyden, 160 Ill., 613, 618.
Boylen *vs.* Smithman, 146 Pa. St., 255, 274.
Boyd *vs.* United States, 116 U. S., 616.
3 Wigmore Evid., sec. 2264.

We cannot permit to pass unchallenged the statement of the solicitor general that the appellant is disputing the rightful authority of courts and juries to investigate crime, and that the principle must be vindicated by a judgment of affirmance in this case. The appellant offers no such contention. He is denying only the power of a court to punish him in a criminal proceeding for failing to produce a book containing transactions with A. Smith and A. Johnson without any evidence being offered to show that such a book ever existed, or that any cash book was within his control when he was first subjected to judicial process. On the other branch of the case he invokes nothing but the guarantees of the Constitution provided by the founders of our Government for the protection of the citizen.

In Boyd *vs.* United States, 116 U. S., 616, 635, Mr. Justice Bradley said that "illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of procedure," and added:

> "This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the

constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

We respectfully submit that the order of the circuit court should be reversed and the appellant discharged.

LAWRENCE MAXWELL, JR.,
THOMAS F. SHAY,
MILLER OUTCALT,
Counsel for the Appellant.

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APR 24 1905
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

JOHN W. BALLMAN, APPELLANT,
v.
THE UNITED STATES.

No. 827, 240

MOTION TO ADVANCE FOR IMMEDIATE HEARING.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

JOHN W. BALLMAN, APPELLANT,
v.
THE UNITED STATES. } No. ——.

MOTION TO ADVANCE FOR IMMEDIATE HEARING.

This case raises the question of the power of a court of the United States to punish for contempt as a means of compelling testimony from an unwilling and obstinate witness before a Federal grand jury. The facts are sufficiently shown in the opinions of Judge Lurton, printed as a separate document and filed herewith.

The matter is urgent. The commitment ordered imprisonment in a county jail until the defendant complied with a previous order to produce a certain book and answer certain questions before the grand jury. The grand jury is now in session. The commitment will expire with the expiration of the current session. The grand jury, as I understand, is not actually sitting at the present moment, having completed its remaining business, but its session has been continued for the time being in order that the embezzlement or abstraction of the money of a national bank, out of

which the present proceedings grow, may be investigated to a conclusion during the present term of court. The grand jury is therefore held in readiness to take this matter up at the point where Mr. Ballman's refusal to produce his cash book and answer the questions propounded interposed an insuperable obstacle to the progress of the investigation. The District Court and the grand jury await the action of this court, but the grand jury can not be continued and held indefinitely, and if its session terminates without a decision on the controversy by this court, the defendant can not be held under the order of commitment, and the present case will present merely a moot question.

The question is very important and of immediate importance, and a real emergency is presented. I submit, therefore, with deference and very earnestly, that the court should advance this cause forthwith for hearing, either during the current week, or on Monday, May 1, or on Monday, May 15, or on such other date during the present term as the court may prefer.

HENRY M. HOYT,
Solicitor-General.

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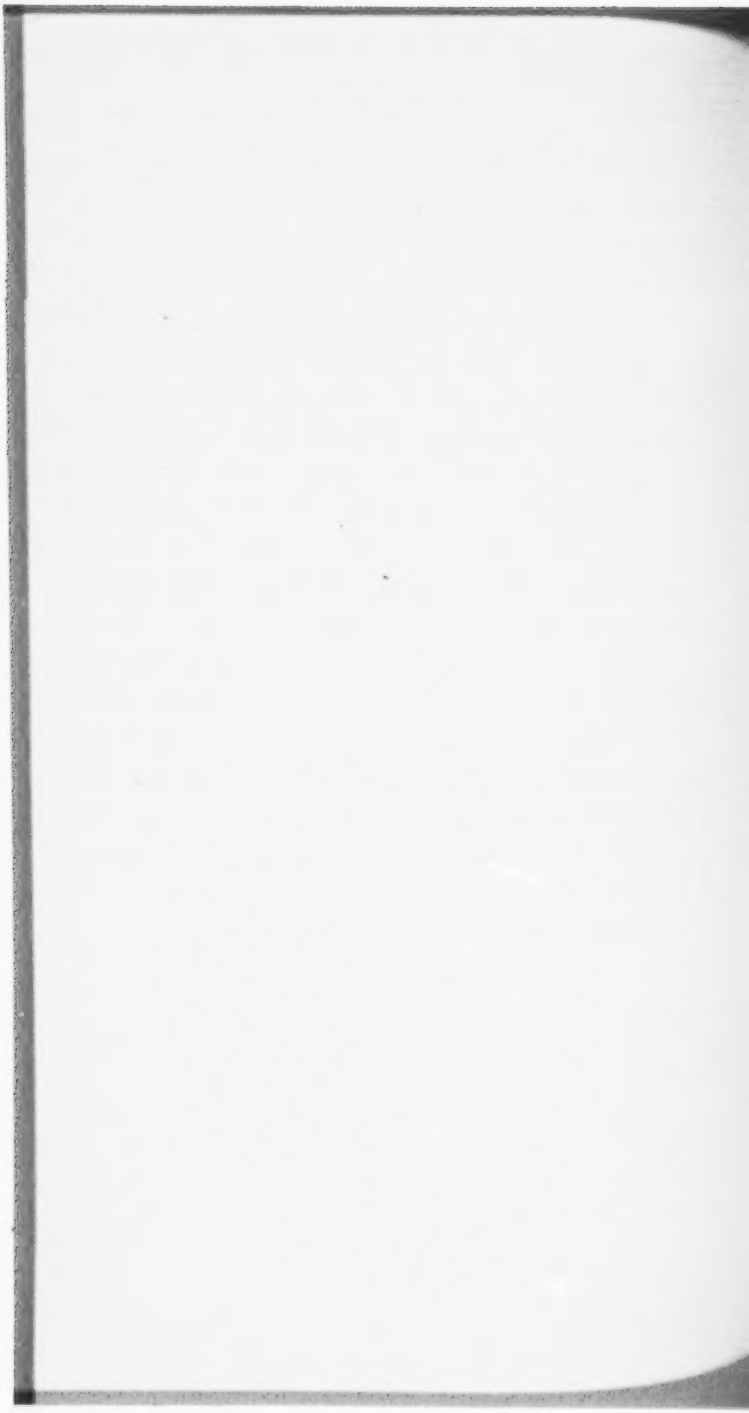

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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOHN W. BALLMAN, APPELLANT,
v.
THE UNITED STATES.
No. ~~687~~ 240.

COMMENT ON MR. MAXWELL'S REPLY TO MOTION TO ADVANCE.

Mr. Maxwell suggests the importance of deliberate and thorough preparation of argument. There must of necessity be a limit to such considerations if the emergency requires hearing at this term. The few points in the case converge on the single principle that no person shall be compelled in any criminal case to be a witness against himself; the subordinate issues are few, the facts simple, and the record brief, as the court will perceive from Judge Lurton's opinions.

Of course the case and the principle involved are very important, but there is ample time before a hearing at this term of court for careful investigation and even elaborate preparation. I venture, with entire

deference, to say that, apart from possible engagements (which Mr. Maxwell would not invoke), the distinguished counsel can adequately prepare this case in the two weeks intervening before May 8, if the court should be disposed to revise the recent adjournment order, or in the three weeks before May 15. Those dates, respectively, would leave to the court three or two weeks to dispose of the case before the final adjournment for the term.

If the court shall grant the motion and fix either the 8th or 15th of May as the date of hearing, I will undertake to place the Government brief in Mr. Maxwell's hands at least one week in advance.

HENRY M. HOYT,
Solicitor-General.

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Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

JOHN W. BALLMANN, APPELLANT,
v.
VIVIAN J. FAGIN, UNITED STATES Marshal for the Southern District of Ohio. } No. ~~827~~ 240.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

JOHN W. BALLMANN, APPELLANT,
v.
VIVIAN J. FAGIN, UNITED STATES Marshal for the Southern District of Ohio. } No. 627.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

A national bank in Cincinnati recently suffered a serious loss; a large sum of money in cash disappeared from its vaults. The Federal grand jury was investigating the occurrence to fix the criminal liability; the circumstances plainly and necessarily pointed to some person in the bank's service, although what person is so far matter of suspicion. The provisions of section 5209, Revised Statutes, were therefore guiding the grand jury's inquiry.

Ballmann, a broker of Cincinnati, was a witness before the grand jury. It seems that on examination

to bring out the relations to his establishment of a supposed speculative customer passing under the names of "A. Smith" and "A. Johnson," he denied substantially that he kept or had a cashbook. The subpœna (issued April 7) required him to produce a cashbook among other documents showing transactions under those names. Thereupon the following proceedings took place:

On the same day (April 7) Ballmann appeared before the grand jury; his examination was futile, it seems, for the grand jury immediately reported in writing to District Judge Thompson that Ballmann refused to produce the cashbook, which was material to their investigation. Ballmann appeared in open court the same day with counsel and the court ordered him to produce all books and papers pertaining to his business and within his control. On April 7 the grand jury reported again and charged contempt, because on his reappearance Ballmann failed and refused to produce the cashbook and refused to answer these questions:

> (*a*) State what on account No. 140, sheet No 1, on this big ledger now in use in your business, these figures under the word "folio" on the debit side of the account, to wit, 349, 349, 349, 349, 349, and 351, refer to.
>
> (*b*) Do not these figures 349, in your handwriting on account No. 140, refer to the folios in your cash book in use in your business in January, 1905?

The case was immediately presented to Judge Thompson in open court, Ballmann and his counsel being present, and evidence was heard. The court adjudged Ballmann in contempt and made an order *nisi* that Ballmann produce the book and answer the questions by noon of April 10, or be committed to the Miami County jail "until he complies * * * or is discharged by due process of law." On April 10, before the grand jury, Ballmann was still recalcitrant and refused to produce the book and declined to answer the questions. Then the court ordered him to be taken into custody and confined as previously directed. The petition for habeas corpus to the Circuit Court (Lurton, J.) followed:

The writ was issued forthwith (April 10); on April 12 the marshal made return by producing the defendant in court, the United States answered, the defendant replied, the case was immediately heard, and on the 13th the petition was dismissed, the writ discharged, and the prisoner remanded. On the 14th an allowance of appeal direct to this court was prayed and assignment of errors filed; appeal was allowed on condition that the transcript be filed with the clerk of this court by April 24, and the defendant was admitted to bail in the sum of $5,000.

JURISDICTION; SCOPE OF REVIEW ON HABEAS CORPUS.

The evidence in the contempt proceedings is before the court. But the facts are found by the district judge, and his finding was approved by the circuit judge on habeas corpus, and this court will not review

or disturb those findings. Judge Lurton accurately states the limit of the reviewing power when he says:

> In such a case the only inquiry admissible is whether in making the order imposing the punishment the court acted within its jurisdiction. * * * The findings of fact, if the court had jurisdiction, are not open to review on a writ of habeas corpus. But when, as in this case, the contention is that the court exceeded its jurisdiction, it is admissible to examine the record of commitment, including the evidence, if made part of the record by bill of exceptions or other order of the court, to see whether jurisdiction existed to make the order which has been disobeyed. If jurisdiction depended upon evidence of a state of facts, then the absence of any evidence which would justify the order made would demonstrate the failure of jurisdiction and render the order of commitment void.

Reviewing the proceedings and evidence on this principle, Judge Lurton concluded that—

> Judge Thompson did not exceed his jurisdiction by requiring the production of a book which evidence showed to be in the possession or under the control of the petitioner.

On this point I submit that if the court shall think that in this court also the findings of fact should be reexamined on the same theory, the court must come to the conclusion reached by Judge Lurton. But will the judgment in contempt of a court of competent jurisdiction, so far as resting upon the determination of a *fact* alone, be reviewed at all by this court?

In the *Swan* case (150 U. S., 637) the controlling fact of seizure of goods *in custodia legis* was admitted, and the lower court adjudged the contempt as a matter of law resulting from that fact. When this court says, as it did in that case, reiterating "what has so often been said before, that the writ of habeas corpus can not be used to perform the office of a writ of error or appeal," that error in the views or conclusion of the lower court does not go to the power of the court, and that the judgment can not be attacked on habeas corpus even if error has actually supervened, this rule must apply *a fortiori* to the finding of the initial and concrete fact upon which the contempt proceedings are based. The initial fact here found by the District Court is that the book existed. Next in order comes the finding of mixed fact and law that the refusal to produce it is contempt. That finding is within the rule and beyond the power of an appellate court to review upon habeas corpus.

In *Ex parte Davis* (112 Fed. Rep., 139) the relator was an attorney, and was charged with conduct in and out of court which, if accompanied with malicious intent, or if it embarassed and obstructed the administration of justice, amounted to contempt of court. The fact that the intent and effect appeared was found by the Circuit Court, and the Circuit Court of Appeals held that to hear and decide and punish if guilty was within the jurisdiction of the lower court and its action can not be reviewed on habeas corpus.

> This question, it must be here observed, does not involve an inquiry into the truth of the

> specific facts recited in the order of commitment, as constituting the contempt. As the writ of habeas corpus does not perform the office of a writ of error or an appeal, these facts can not be reexamined or reviewed in this collateral proceeding. They present a case which, so far as the subject-matter is concerned, was manifestly within the jurisdiction of the Circuit Court. (*Ex parte Terry*, 128 U. S., 289, 305.)

It is not necessary to speculate now what would be open to review on appeal or writ of error to the judgment in contempt, or what the proper Court for such review would be. But whether it is this Court or the Circuit Court of Appeals, or may be either (*Spreckels Sugar Ref. Co.* v. *McClain*, 192 U. S., 397), it is to be remembered that so far as the contention is addressed to the merits of the case, and not to the jurisdiction of the lower court—(190 U.S. p. 38):

> An erroneous conclusion in that regard can only be reviewed on appeal or error, or in such appropriate way as may be provided. (*Louisville Trust Co.* v. *Comingor*, 184 U. S., 18, 26; *Ex parte Gordon*, 104 U. S., 515.)
>
> And while proceedings in contempt may be said to be *sui generis*, the present judgment is in effect a judgment in a criminal case, over which this court has no jurisdiction on error. (Section 5, act of March 3, 1891, 26 Stat., 826, c. 517, as amended by the act of February 20, 1897, 29 Stat., 492, c. 68; *Chetwood's case*, 165 U. S., 443, 462; *Tinsley* v. *Anderson*, 171 U. S., 101, 105; *Cary Manufacturing Co.* v. *Acme Flexible Clasp Co.*, 187 U. S., 427, 428.)

The constitutional basis of jurisdiction in this court; indefiniteness of punishment.

The case is brought here directly on the ground that the fourth and fifth amendments to the Constitution are involved. That is sufficient for the jurisdiction of this court under paragraph 4, section 5, of the Circuit Court of Appeals act. The provision of the fourth amendment is:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated.

The fifth amendment provides:

> No person * * * shall be compelled in any criminal case to be a witness against himself.

The other errors assigned (Rec., pp. 49–50) aver that there was no evidence to sustain the order of commitment in contempt; and that the punishment inflicted is void for indefiniteness. As I have just pointed out, the first of these can not be considered.

The punishment is necessarily indeterminate here, but it contravenes no rule. Punishment in contempt often takes this phase, where witnesses resist, "until" the obstinate person obeys. It is not like some flagrant impertinence or impropriety before a court, or some violence upon the court or its officers, or in the court's presence. Such an occurrence but for the effect and penalty is definitely ended when the immediate event is past. The punishment may therefore be definite as a lesson and penalty only for the offense,

but here a result is sought and must be compelled. The refractory person is to be reduced, so that he shall, if possible, cease his obstruction to all the court's proceedings. Besides, inasmuch as the present grand jury expires by absolute limitation of law on October 1 next (sec. 572, R. S.), the punishment imposed is not indeterminate. It is definite on the principle *id certum est quod certum reddi potest.* The term of imprisonment is absolutely limited to October 1 next, and the appellant can shorten it whenever he sees fit to obey.

The opinions below.

A brief review of the opinions of Judge Thompson and Judge Lurton will emphasize the real nature of the case and bring us to the important question involved, viz, the nature and extent of the constitutional privilege as to self-incrimination.

The witnesses were before Judge Thompson, and he heard them, the foreman of the grand jury, and three employees of Ballmann who were naturally reluctant witnesses. It is evident that these witnesses testified before the grand jury that there was a cashbook in use until a day or two before Ballmann first appeared before the grand jury, and that posting references in the "loose-leaf" ledger which was produced referred to the folio or page of that cashbook. The attempt of the witnesses when before Judge Thompson to show that the ledger "folio" entries did not necessarily refer to the cashbook, because loose slips were also used, is a purposeless attempt to confuse and mislead, because it is perfectly well known in all

systems of bookkeeping that original slips from which entries are posted naturally bear the number of the page of the book of first entry—that is, the cashbook—on which they are entered, for purposes of checking and identification, so that "No. 349, 351," etc., might refer to the slip, as well as the cashbook; but whether the ledger was posted from the slip or the cashbook, the cashbook page was inevitably the real significance of the number.

It is incredible that even in the kind of brokerage business in which it is convenient to have transactions wiped out in oblivion as far as possible at the end of each day, there should not be a cashbook. That is the foundation book of account in every business, and it is too much to expect reasonable men to believe that there was not a cashbook in Mr. Ballmann's business. Accordingly, Judge Thompson (Appendix p. 60), in weighing the evidence, finds that—

> Looking through it all, I have no manner of doubt that there was a cashbook in use and employed in this business, and that it was there Monday [April 3], and that this clerk, Clements, and Ballmann and Hunt all made entries upon the ledger from the cashbook, and they referred to the page of the cashbook by the number under the heading "Folio." * * * I feel constrained to say upon this evidence that that book to-day is within his [Ballmann's] control, if not in his actual possession.

Judge Thompson points out that Ballmann is not charged with any offense, and there is nothing in his

relation to the matter under investigation that tends to criminate him; that to sustain his counsel's suggestion of perjury would enable any man, desiring to withhold evidence material and necessary to promote the ends of justice, to answer one question and then decline to answer further questions on the theory that if it is assumed he lied in his first answer, his remaining answers might confirm that charge and incriminate him, and thereupon he might claim exemption from giving any information whatever.

Judge Lurton held that the evidence strongly tended to show that Ballmann had a cash book, currently used in his business down to April 3, and that this book was still either in his possession or under his control; that the evidence "made a case in which he [Ballmann] was called upon to show, if such was the fact, that the book described in the evidence to which the order of April 8 and the order of April 10 referred had been lost or destroyed after the date when it was last seen in Mr. Ballmann's possession or in his office."

On the question of privilege Judge Lurton cites *Ex parte Irvine* (74 Fed. Rep., 954), decided by Circuit Judge Taft, which held that a witness can not avoid answering any question by the mere statement that the answer would tend to criminate him, without regard to the reasonableness of that statement. Judge Lurton himself states the principle thus:

> It is for the judge before whom the question arises to decide whether an answer thereto may reasonably have a tendency to criminate the witness or to furnish proof, an element or a

> link in the chain of evidence necessary to convict him of crime [citing the rule as laid down by Chief Justice Marshall during the trial of Aaron Burr (Fed. Cases, No. 14692e)].

Analyzing the situation and the nature of a *direct* answer, Judge Lurton proceeds:

> This witness had been asked to produce a certain book. He had said that that book did not exist to his knowledge, and now that answer is being tested by further questions growing out of certain entries in his own handwriting in another book which he had produced. Of course it is obvious that a witness who has answered a question in one way can not say: "If I am further questioned, if I am further examined about that matter, I may criminate myself by making inconsistent answers." That would permit every witness to close his mouth when he found himself about to be cornered.

The learned judge's conclusion was that a direct answer to the two questions would not reasonably tend to implicate the defendant or criminate him.

ARGUMENT.

I.

The origin of the guarantees; the Boyd and Counselman cases; other authorities.

The guarantee of the fourth amendment was founded on the principle that every man's house is his castle, and guarded against unwarrantable intrusion by executive agents. "General warrants" of a Secretary of

State, not naming persons or things, were finally overthrown in the cases of Wilkes and Entick (note, p 426, Cooley's Constitutional Lim., 7th ed.; *Wilkes case*, 2 Wils., 151, 19 State Trials, 1405; *Entick* v. *Carrington*, 2 Wils., 275, 19 State Trials, 1030). In America the chief abuse was by writs of assistance from the courts to revenue officers, empowering them to search suspected places, in their discretion, for smuggled goods, which Otis condemned as the worst instrument of arbitrary power, "because they placed the liberty of every man in the hands of every petty officer." (Cooley *ut sup.*, p. 428; John Adams's Works, Vol. II, pp. 523, 524; 4 Bancroft's Hist. U. S., 414; Quincy, Mass., Rep., 51, and Appendix, p. 395, for a history of writs of assistance, by the late Mr. Justice Gray, *Boyd* v. *United States*, *infra*.) "All these matters are now a long way in the past; but it has not been deemed unwise to repeat in the State constitutions, as well as in the Constitution of the United States, the principles already settled in the common law upon this vital point in civil liberty" (Cooley as cited; as to revenue seizures, *Henderson's Distilled Spirits*, 14 Wall., 44, shows that the regulations of Congress, however unreasonable they seem, must prevail). In other words, the historical foundation and reason of the rule was protection against *executive* tyranny and interference in private affairs without any proper judicial occasion or process. That evil has disappeared, and the remedy of the constitutional guarantee must be construed in the light of its origin and purpose, and must not be en-

larged beyond its true scope or perverted to meet an entirely different situation.

Story traces the subject along the same lines and a note cites the famous case of Bollman and Swartwout as illustrating forcibly the operation of the amendment (2 Story on Constitution, 5th ed., secs. 1901, 1902, pp. 647–650, and note 2, p. 649). Indeed, the stress and meaning of the guarantee are clearly indicated by the concluding clause requiring a due warrant and specification of its objects. *Search warrants* and *arrests* are in mind and regular action by a judicial magistrate is enjoined.

The natural view certainly is that in the present case there is neither seizure, search, or arrest. A court duly inquiring into a criminal transaction summons a witness and orders him to bring the books of his business, as material to the inquiry, and to answer certain legitimate and competent questions.

The principle of the guarantee of the fourth amendment appeared much more recently in the law than did that of the fifth amendment. The first statements of the former are found in the decisions of the Wilkes and Entick cases; but the rule of the fifth amendment appears first in the canon law phrase, *Nemo tenetur seipsum prodere* (or *accusare*), which grew out of the heresy trials in England early in the seventeenth century.

However, since the court has, in recent cases, found an intimate connection between the fourth and fifth amendments, and has construed the present meaning of

both in the light of their origin and history, it will be unnecessary to trace these principles further from the original sources or the text-books.

In *Boyd* v. *United States* (116 U. S., 616) it was pointed out that both the fourth and fifth amendments relate to the personal security of the citizen; that they nearly run into and mutually throw light upon each other; that when the thing forbidden in the fifth amendment—viz, compelling a man to be a witness against himself—is the object of a search and seizure of his private papers, it is an unreasonable search and seizure within the fourth amendment. The law there was a customs law, authorizing a court of the United States in revenue cases, on motion of the Government attorney, to require the defendant or claimant to produce in court his private books, invoices, and papers, or else the allegations of the attorney to be taken as confessed. The court examines carefully the reasons and development of these guarantees, but their views and conclusions were all expressed with reference to a case where the "witness" under the compulsion of the law was substantially the defendant on trial; the proceedings were *in rem* for forfeiture of goods alleged to have been fraudulently imported. The foundation of the court's judgment is this: That a proceeding to forfeit a person's goods for an offense against the laws, though civil in form, and whether *in rem* or *in personam*, is a "criminal case" within the meaning of that part of the fifth amendment which declares that no person "shall be

compelled in any criminal case to be a witness against himself." The essential distinctions, therefore, between the Boyd case and the case at bar are manifest without further statement.

In the *Counselman* case (142 U. S., 547) the grand jury was investigating alleged violations of the interstate commerce laws punishing, in effect, the giving or receiving of unlawful discriminations in rates or charges. The witness, a receiver and shipper of grain, was asked whether he had obtained from various railroads less than tariff rates on transportation of grain, or knew of any person or company who had. He declined to answer, on the ground that it might tend to criminate him.

The court called attention to the broad language of the fifth amendment ("*any* criminal case"), and held that the matter under investigation by the grand jury was criminal and that the "case" before the grand jury was a criminal case; that if Counselman had been guilty of the matters inquired of, he was liable to criminal prosecution; that the reason for his refusal was his apprehension that if he answered the questions truly and fully, as he was bound to do if he answered them at all, it might appear that he had committed a crime for which he was so liable. The appellant was accordingly discharged.

The court reviews the State cases at length and comes to these conclusions on the principles of law involved: That whether the language of a constitutional provision is like that of the Constitution of the

United States ("in any criminal *case*," or "in any criminal *prosecution*"), or broader ("no man can be compelled to give evidence against himself"), the manifest purpose of all such provisions is to prohibit the compelling of testimony of a self-criminating kind from a party or witness. All such constitutional guaranties should have, as far as possible, the same interpretation. Unless a statute wholly exempts from prosecution, so as to fulfill the purpose of the constitutional provision, and takes its place as a protection, the privilege must be preserved. "Legislation can not abridge a constitutional privilege or replace or supply one, at least unless it is so broad as to have the same extent in scope and effect." Section 860, Revised Statutes (providing that no evidence judicially obtained from a party or witness shall be used against him in any criminal proceeding, except that this exemption does not extend to perjury in testifying), unlike some State statutes, does not undertake to compel self-criminating evidence; and, on the other hand, unlike some State statutes, section 860 does not supply a complete protection from all the perils against which the constitutional provision was designed to guard. "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States."

It may be remarked here that, in consequence of the *Counselman* decision, the interstate-commerce laws

were amended so as to afford this complete protection, and accordingly in *Brown* v. *Walker* (161 U. S., 594) the witness was compelled to answer. (See as to anti-trust law, act of February 25, 1903, 32 Stat., 854, 903.)

The court in the *Counselman* decision notes specifically that while section 860 protects a witness against the use of his testimony in a prosecution against himself, it does not prevent the use of his testimony to search out other testimony, nor prevent the obtaining and use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion. It is shown that Chief Justice Marshall in *Burr's Trial* stated the true sense of the rule to be that no witness is compellable to furnish any one of the many links frequently composing the chain of testimony necessary to convict of crime; and that this principle was followed in *People* v. *Mather* (4 Wend., 229) by the declaration that the exemption extends to the disclosure of any fact which might constitute an essential link in a chain of evidence of guilt, although that fact alone would not indicate any crime.

Nevertheless, appreciating the full extent of the Counselman decision, and its authoritative comment on the State cases, I note certain elements of that case regarding which it is worth while to point out one or two other features of the State cases reviewed by the court. In the first place, Counselman was asked questions relating to *previous* transactions with which he was manifestly connected and which were supposed to be criminal. He was asked

questions going to the heart of the substantive matter which the grand jury were investigating; the questions did not relate to occurrences before the grand jury itself,—to the witness's own previous acts and statements there. Counselman's "apprehension was that if he answered the questions truly and fully (as he was bound to do if he should answer them at all), the answers might show that he had committed a crime"—that is, was a party to the particular violations of law which the grand jury were investigating. Ballmann does not say this, but apparently fears that, if he answers, his previous answers or statements before the grand jury will be shown to be untrue. In Emery's case, as quoted in the *Counselman* opinion (107 Mass., 172; 142 U. S., 572, 573), the witness declined in writing to answer one of the questions upon the grounds, "first, that the answer thereto will accuse me of an indictable offense; second, that the answer thereto will furnish evidence against me by which I can be convicted of such an offense."

Here the precise question is whether the witness, simply refusing before the grand jury to answer certain questions, without, in the first instance, invoking his privilege or assigning any reason, and denying that he ever had the book called for, and in court, through counsel, saying as to the book that "we haven't got it" and "there is no evidence that the defendant had any book in his possession at any time since this inquest was instituted," and handing the court a paper reading as to the questions asked, "I refuse to answer, as they might tend to incriminate me," without more, can, under

the ruling of the *Counselman* case, escape from the compulsion to answer and produce. Is it prosecution for perjury before the grand jury which he fears, and, if it is, is he relieved from testifying on that score, or is it prosecution for the previous offense which the grand jury were investigating, or is it some other prosecution; and in any case can he terminate this whole inquiry without further and more specific statement setting up definitely, under oath, that his answers and production of the book would subject him to prosecution for this or that offense, stating how and why and respecting what offense the privilege is invoked? It is true that his counsel suggested fear of perjury at the hearing before the District Court (opinion of Judge Thompson, Appendix, p. 61), but this claim has never been distinctly and definitely made.

In fine, is a witness in the exact situation of Ballmann protected by the privilege?

Following the Counselman case certain opinions of the court touch upon or approach the present inquiry, but do not solve it. The *Brimson* case (154 U. S., 447) decided that a certain auxiliary proceeding in the Circuit Court, under the interstate commerce acts, was a case or controversy to which, under the Constitution, the judicial power of the United States extends. In showing that a witness in that situation may invoke his constitutional privilege and that power over interstate commerce does not carry with it authority to destroy or impair the fundamental guranties of personal rights, the court referred to *Counselman* v. *Hitchcock* with approval. In *Brown* v.

Walker (161 U. S., 591), to which I have already referred, the amendment of 1893 to the interstate commerce act, forbidding the plea of self-crimination as an excuse for testifying, but exempting a witness from any prosecution or penalty on account of any transaction concerning which he may testify, was held sufficient to satisfy the constitutional guaranty of protection.

Beyond certain references to the principles and previous cases, in illustration or collaterally (*Robertson* v. *Baldwin*, 165 U. S., 275, 282; *Bram* v. *United States*, 168 U. S., 532, 543–545), the court has not further passed upon the meaning of the guaranty.

Adams v. *New York*, 192 U. S., 585, involved an entirely different point (as to admissibility on trial of papers obtained under a valid search warrant before indictment) and referred to the *Boyd* case but not the *Counselman* case.

Brown v. *Walker* recognized fully the authority of *Counselman* v. *Hitchcock*, but pointed out as follows the legitimate limitations of that decision:

> The danger of extending the principle announced in *Counselman* v. *Hitchcock* is that the privilege may be put forward for a sentimental reason or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to

be made the tool of others who are desirous of seeking shelter behind his privilege.

This suggests the related idea expressed in *Temple* v. *Commonwealth* (75 Va., 892) that "when a witness on oath declared his belief that his answer would tend to criminate himself, the court could not compel him to answer unless it was perfectly clear from a careful consideration of all the circumstances in the case that the witness was mistaken and that the answer could not possibly have such a tendency." *Temple* v. *Commonwealth* is among the cases cited in *Counselman* v. *Hitchcock* and approved the previous Virginia case of *Cullen* v. *Commonwealth* (24 Gratt., 624), "upon which much reliance was placed in *Counselman* v. *Hitchcock*." (*Brown* v. *Walker*, 161 U. S., at p. 595.)

Now, the cautionary words in *Brown* v. *Walker* quoted above describe the situation here precisely, and the question is immediate, Who is to determine whether the protection is fanciful, the danger real or imaginary, the witness mistaken or not; and the answer necessarily is, the court before whom that question properly comes.

There are other expressions of this caution. In the recent exhaustive work of Professor Wigmore (Treatise on the System of Evidence in Trials at Common Law: 1904) the qualifying ideas are admirably stated. I am aware that the views of even the most distinguished text writers are of limited authority in the courts, but the reasoning of able minds and students of the law is always helpful, especially where general principles are concerned and original or unsettled propositions in legal logic are discussed. The author is

discussing the *duty* of giving testimony, requiring sacrifices from every member of the community of time, labor, and privacy—sacrifice "of the knowledge which he would preferably keep to himself because of the disagreeable consequences of disclosure. * * * When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private. All that society can fairly be expected to concede is that it will not exact this knowledge when necessity does not demand it, or when the benefit gained by exacting it would in general be less valuable than the disadvantage caused; and the various privileges are merely attempts to define the situations in which, by experience, the exaction would be unnecessary or disadvantageous. The duty runs on throughout all, and does not abate; it is merely sometimes not insisted upon. * * * The whole life of the community, the regularity and continuity of its relations, depend upon the coming of the witness. * * *"

It follows, on the one hand, that all privileges of exemption from this duty are exceptional, and therefore to be discountenanced. There must be good reason, plainly shown, for their existence. In the interest of developing scientifically the details of the various recognized privileges, judges and lawyers are apt to forget this exceptional nature. The presumption against their extension is not observed in spirit. The trend of the day is to expend them as if they were large and fundamental principles, worthy of pursuit into the remotest analo-

> gies. This attitude is an unwholesome one. The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.

The learned author then goes on to speak of the fair demand of the witness that the exaction should be as little onerous as possible with respect to delay, loss of time, and other annoyances. (3 Wigmore, pp. 2967, 2968.)

Again, in discussing the history of the privilege against self-crimination (*ut sup.*, p. 3069, secs. 2250 *et seq.*) he quotes from Bentham, from a certain report of English Commissioners on Criminal Law, and from Stephens's History of the Criminal Law, and then proceeds (p. 3102) as follows:

> It is enough for justice and for the commonwealth that the privilege exists, immovably fixed in the Constitution. The good which it aims at consists in that general fact and system, and not in the individual application of it to a given claimant. *That* effects mostly harm—a particular harm which we suffer for the larger good.
>
> The privilege, therefore, should be kept within limits the strictest possible. So much of it lies in the interpretation that its scope will be greatly affected by the spirit in which that interpretation is approached. Much can be set-

tled by a consideration of its historic scope before the constitutions were made; but after all this the decision will constantly depend upon whether the privilege is approached with favor or with disfavor, with fatuous adulation or with judicious appreciation. In the past twenty years, and especially in a few American courts, this practical difference of effect is plainly apparent; for, under the guise of reasoning and interpretation, the privilege has by them, in a spirit of implicit favor, been so extended in application beyond its previous limits as almost to be incredible, certainly to defy common sense. Even Lord Hardwicke, who a century and a half ago called it "a rule of great justice and tenderness" [citing *Harrison* v. *Southcote*, 2 Ves. Sr., 389, 394], could he now revisit the glimpses of the moon and observe the rule in those courts, would marvel what manner of justice we had contrived. But a reaction must come. A true conservatism must recommence to operate. More than one great modern judge is found to pronounce against the favor that has in the past been granted to it.[a] A multiplicity of statutes have shown how seriously it is felt to block the investigation and punishment of crime. Courts should unite to keep the privilege strictly within the limits dictated by historic fact, cool reasoning, and sound policy.

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[a] The footnote here is as follows:

1882, Jessel, M. R., in Ex parte Reynolds, 15 Cox Cr. 108, 115 ("Perhaps our law has gone even too far in that direction"); 1875, Appleton, C. J., in *State* v. *Wentworth*, 65 Me., 234, 241 ("It is the privilege of crime; the interests of justice would be little promoted by its enlargement").

In the *Irvine* case (74 Fed. Rep., 954), which Judge Lurton cites, Judge Taft, on petitions for habeas corpus, followed the *Counselman* decision, and discharged the prisoners on the ground that the evidence before the court and the circumstances under which it was sought to elicit answers afforded reasonable ground for concluding that the evidence sought might criminate them and probably establish an offense. Therefore the plea of privilege should have been upheld, and the Circuit Court was without power to compel answers. These were the facts: The witnesses were summoned on the trial of an indictment against numerous defendants for conspiracy to violate the anti-lottery act of 1895. It was first brought out at the trial that policy lottery shops were conducted in Cincinnati by the defendants, operating between Covington and Cincinnati by means of "runners" carrying bets and money slips or certificates of drawings back and forth between the Kentucky office and the Cincinnati policy shops; that the witnesses were "runners" or "carriers." Thereupon one of the witnesses was asked whether the policy writers and another "runner" were not engaged in that business, and the other witness was asked whether he did not know one of the policy writers. They declined to answer on the ground that it might tend to incriminate them. There was evidence suggesting that one of the witnesses had been "coached" in behalf of defendants, and that he did not invoke the privilege in good faith. He had not claimed the privilege when before the grand jury.

Judge Taft, in the course of the opinion, lays down the essential and controlling principle as follows:

> The great weight of authority, as well as a due regard for the right of the community to have the wheels of justice unclogged as far as may be consistent with the liberty of the individual, leads us to reject the doctrine that a witness may avoid answering any question by the mere statement that the answer would criminate him, however unreasonable such statement may be. The true rule is that it is for the judge before whom the question arises to decide whether an answer to the question put may reasonably have a tendency to criminate the witness or to furnish proof of a link in the chain of evidence necessary to convict him of a crime. It is impossible to conceive of a question which might not elicit a fact useful as a link in proving some supposable crime against a witness. * * * It must appear to the court from the character of the question and the other facts adduced in the case that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime.

Judge Taft quotes from the opinion of Chief Justice Marshall on the Burr trial (*infra* and 25 Fed. Cas. No. 14692 *e*) on the point that it is the province of the court to judge of the criminating effect of direct answer to the question, and cites the English statement of the rule as laid down in *Regina* v. *Boyes* (1 Best & Smith, 329), followed and approved in *Ex parte Reynolds* (20 Ch. Div., 294), viz, that—

> To entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer;

but that—

> If the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question, there being no doubt * * * that a question which might appear at first sight a very innocent one might, by affording a link in a chain of evidence, become the means of bringing home an offense to the party answering.

Other authorities on the rule that it is for the court to determine whether a direct answer may criminate the witness are as follows:

The English doctrine on the point is set forth in Best's Law of Evidence, section 128, pp. 175–180.

The American doctrine is thus stated in Greenleaf on Evidence:

> Sec. 451. Where witness may refuse to answer. Exposure to penalty. In regard to the privilege of witnesses in not being compellable to answer, the cases are distinguishable into several classes: (1) Where it reasonably appears that the answer will have a tendency to expose the witness to a penal liability, or to any kind

> of punishment, or to a criminal charge. Here the authorities are exceedingly clear that the witness is not bound to answer. And he may claim the protection at any stage of the inquiry, whether he has already answered the question in part, or not at all. If the fact to which he is interrogated forms but one link in the chain of testimony, which is to convict him, he is protected. And whether it may tend to criminate or expose the witness is a point upon which the court are bound to instruct him; *and which the court will determine, under all the circumstances of the case;* but without requiring the witness fully to explain how he might be criminated by the answer which the truth would oblige him to give.

Chief Justice Marshall in the *Burr* case, noting that Government counsel construed the privilege too narrowly and counsel for the witness too broadly, thus stated the rule as to the province of the court:

> When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be. The court can not participate with him in this judgment, because they can not decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of

> the privilege which the law allows and which he claims. * * * It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case a witness must himself judge what his answer will be, and if he say on oath that he can not answer without accusing himself, he can not be compelled to answer.

It is evident, on reading the opinion, that what the Chief Justice held was that it is for the court to determine whether a direct answer to the question put *could* criminate the witness, and if it could, then it is for the witness to determine whether the answer he would make *would* criminate him.

In *United States* v. *Miller* (2 Cranch Cir. Ct., 247) the court held that a direct answer to the question put to the witness to a duel—whether he saw the defendant shoot his opponent—would not criminate him, and ordered him to answer, and upon his refusal committed him for contempt. The doctrine of the case is thus stated in the headnote:

> A witness in a criminal cause, will be compelled to answer a question which he says, upon his oath, he can not answer without disclosing a fact which may be material and important evidence to criminate himself, as participator in the

> same offense for which the defendant stands indicted; provided the court should be of opinion that no direct answer to the question could furnish evidence against the witness.

In that case Chief Judge Cranch was of opinion that an answer to the question might criminate.

In *Sanderson's* case (3 Cranch Cir. Ct., 638) it was held, as stated in the headnote:

> A witness is bound to answer, before the grand jury, to a question the answer to which might implicate himself; and he is the sole judge whether it will. *The court is to decide whether the answer could implicate the witness.*

In *United States* v. *McCarthy* (18 Fed., 87), Circuit Court Southern District, New York, the court said:

> It is not sufficient to excuse the witness from answering that he may in his own mind think his answer to the question might by possibility lead to some criminal charge against him, or tend to convict him of it if made. The court must be able to perceive that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. (*Regina* v. *Boyes*, 1 Best & S., 311; Whart. Ev., sec. 538.)

In *Stevens* v. *The State* (50 Kans. 712) the court said (pp. 716–717):

> The rule, as we understand it, is to require the witness to answer when it is apparent to the court that an answer would not interfere with his legal right and privilege. If, however, the fact upon which he is interrogated forms but a single link in the chain of evidence which

> would lead to his conviction, he is protected. *And this is a matter for the court to determine, under the facts and circumstances surrounding each case.*

In that case the court referred to *Ford* v. *State* (29 Ind., 541), where it was said:

> After the witness claims his privilege, the defendant may show by other witnesses that the circumstances were such that the act of intercourse would not have been criminal, and when it is thus made clear that the right to be silent does not exist, the witness may be compelled to answer.

In *Minters* v. *The People* (139 Ill., 363), the court said (p. 366):

> If the fact to which he is interrogated forms but one link in the chain of testimony which is to convict him, he is protected; and *whether it may tend to criminate or expose the witness is a point which the court will determine under all the circumstances of the case*, but without requiring the witness fully to explain how he might be criminated by the answer which the truth would oblige him to give.

In *The People* v. *Mather* (4 Wend., 229), the court said (p. 254):

> My conclusion is, that where a witness claims to be excused from answering a question because the answer may disgrace him or render him infamous, the court must see that the answer may, without the intervention of other facts, fix on him moral turpitude. Where he claims to

> be excused from answering because his answer will have a *tendency* to implicate him in a crime or misdemeanor, or will expose him to a penalty or forfeiture, then *the court are to determine whether the answer he may give to the question can criminate him, directly or indirectly*, by furnishing direct evidence of his guilt, or by establishing one of many facts, which together may constitute a chain of testimony sufficient to warrant his conviction, but which one fact of itself could not produce such result; and if they think that the answer *may* in any way criminate him, they must allow his privilege, without exacting from him to explain how he would be criminated by the answer which the truth may oblige him to give.

That it is for the court and not for the witness to determine whether an answer could criminate him is shown by the following Massachusetts cases, where the witness was required to answer: *Commonwealth* v. *Willard* (39 Pick., 476); *Commonwealth* v. *Kimball* (41 Pick., 366), opinion by Chief Justice Shaw.

In *Ex parte Senior* (37 Fla., 1), the court, after reviewing the authorities, said (p. 20):

> While the witness must judge of the effect of his answer, and should not be required to explain how it will criminate him, yet the court must determine under all the circumstances of the case whether such will be its tendency from the question asked; and where from the nature of the investigation and the character of the testimony sought, it reasonably appears that the answer may criminate or tend to criminate, the

witness has the right to claim his privilege, and is not bound to answer. (*State* v. *Duffy*, 15 Iowa, 425; *Kirschner* v. *State*, 9 Wis., 140; *Chamberlain* v. *Wilson*, 12 Vt., 491; *Ex parte Boscowitz*, 84 Ala., 463.)

The doctrine announced by Chief Justice Marshall in *United States* v. *Burr* was applied by the Supreme Court of Iowa in *Richman* v. *The State* (2 Greene, 532). In that case a witness before the grand jury was required to answer the following question: "Do you know of any person, other than yourself, being engaged in gaming at any time within two years, in the county of Muscatine?"

The court said (p. 534):

> When it is evident to the mind of the court that the answer can not accuse the witness the court should require him to respond to the interrogatory. If this were not the case, it would be in the power of the witness, when called upon to give testimony in a criminal case, to refuse to do so. If he is to be sole judge whether the answer would implicate him by thus answering it would be impossible to elicit any testimony. Perjury could not only be committed with impunity by stating that the answer would criminate him, but the guilty would be screened from merited punishment. We can not sanction a rule fraught with such dangerous consequences. The direct tendency of such a rule would be to suppress truth and prevent the administration of justice. Therefore, we think the better and safer rule to be

that of compelling the witness to answer when it is apparent to the court that such answer would not interfere with his legal privilege. In this case, it was evident from the scope of the question, that an answer could not possibly infringe upon this right, and yet the witness makes himself the judge, and refuses the answer.

The position of the witness furnishes a familiar illustration of the evil consequences which would result from the enforcement of such a rule as he has contended for in the argument, and a most potent reason for the distinction which we have made.

Cited in *Printz* v. *Cheeney* (11 Iowa, 469).

The subject was carefully considered by the Supreme Court of North Carolina in *La Fontaine* v. *Southern Underwriters* (83 N. C., 132).

The court said (p. 141):

Upon a review of the authorities, we are clearly of opinion that the view of the law propounded by Lord Wensleydale (10 Ex., 701) in *Osborn* v. *The London Dock Company*, and acted upon by Vice-Chancellor Stuart in *Sidebottom* v. *Adkins* (3 Jurist. N. S., 631, 632), is the correct one; and that to entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is no reasonable ground to apprehend danger to the witness from his being compelled to answer. (Best Ev., 125; *Forbes* v. *Willard*, 37 How. Pr. Rep., 193.)

In *Floyd* v. *The State* (7 Texas, 215) the doctrine of *United States* v. *Burr* is stated to be the correct rule on that subject.

To the same effect is the opinion of the Supreme Court of Wyoming in *Miskimmins* v. *Shaver*. (8 Wyo., 392, 418–419.)

In nearly all, if not all, the cases in which the privilege was claimed and allowed it was apparent from the question asked, as pointed out by Chief Justice Marshall in Burr's case, that a direct answer would criminate the witness. These cases contain no discussion of the question whether it is for the court or the witness to determine if an answer would criminate him, but it is apparent that it was regarded as a matter for the court.

The King v. *Gordon*, 2 Doug. K. B. Rep., 593.
Paxton v. *Douglas*, 19 Ves. Ch., 224.
Maloney v. *Bartley*, 3 Campb., 210.
Cates v. *Hardacre*, 3 Taunt., 424.
Rex v. *Pegler*, 5 C. &. P., 687.
Fisher v. *Ronalds*, 16 Eng. Lon. & Eq., 417.
Emery's Case, 107 Mass., 172.
In re Graham, 8 Ben., 419.
Bank v. *Henry*, 2 Den., 155.
People ex rel. Taylor v. *Seaman*, 8 Miscel. (N. Y.), 152.
Cullen v. *Com'th*, 24 Gratt., 624.
Smith v. *Smith*, 116 N. C., 386.
Lester v. *Boker*, 6 Blachf. (Ind.), 439.
Johnson v. *Goss*, 2 Yerg. (Tenn.), 110.
Lea v. *Henderson*, 1 Coldw. (Tenn.), 146.
Ex parte Clarke, 103 Cal., 352.

II.

The necessity of sensible and reasonable interpretation: distinctions between this case and those where the privilege has been upheld.

Now, to apply all these doctrines and to show that the present case is to be broadly and certainly distinguished from *Counselman's* case, the rule, like all other legal rules, is the product of experience and reason and must be interpreted in a sensible and reasonable way. A man may not claim the privilege on a whim of the mind or figment of the imagination. It is not a matter of bald assertion to be securely followed by impenetrable silence and portentous mystery. In any case we have the right to analyze. In *Counselman's* case a direct, affirmative answer to the question would have shown that the witness himself was a fellow-offender in the violations of law under investigation. He alone, perhaps, knew what his situation was. If he had said "yes" to the questions whether he had obtained less than published rates, he would have been instantly liable to indictment. His own testimony could not be used against him, but with that lead the Government could confidently proceed to search out other testimony and construct a case. If he said "no," and the fact were otherwise, his situation would be about the same, with this difference and additional risk, however, that the imperfect exemption of section 860 excepts perjury in testifying.

Irvine and Wagner were in similar case. Their complicity in the offense had already appeared.

Direct answers to the questions would have tended to establish their guilt. The connection was certain, immediate, and material; the reason and reasonableness of their refusal were patent.

What are the distinctions in the present case? I take up the analysis *seriatim* in the two aspects of the cashbook and the questions.

(a)

As to the book.

The subpœna directed Ballmann to bring his books, including the cash book, showing accounts in certain names. He broadly denied in reality keeping any cash book. If he says now that his denial only referred to such specific accounts, the reply is that he has never really changed this denial and says still that he has not got a cash book and has never had such a book since the investigation began. If this is supposed to save his veracity by implying previous existence of the book and ignorance of its fate and present whereabouts, and to justify his original denial, he should have explained what had become of the book or why he did not know what has become of it. He is concealing and doubling, and he offers us puerile inferences.

The court, in order to pass over his refuge behind the named accounts, ordered him then to produce *all* books used in his business—a perfectly justifiable order under the circumstances. But the final order of April 10, and the only one on which his complaints are or

can be based, ordered him simply to "*produce the said cashbook* and answer the questions set out in said charges of contempt," the District Court having determined necessarily, as did Judge Lurton, that the book was in existence and under the defendant's control. He is in a dilemma, of course. He has not invoked his privilege respecting the book, because to do so would admit its existence and show his previous statements to be false. So we need not inquire whether the privilege operates with the same effect on a refusal to produce a book as on a refusal to answer a question. In reason it would seem not, because the production of a book is preliminary to examination and is not like a definite answer to a definite question. To apply the privilege flatly to a refusal to produce on that ground would manifestly be altogether too vague and general, and would come under the condemnation of unreasonableness.

Now, it may be claimed that the fourth amendment was invoked on this branch of the case—that is, as to the production of the book, as well as on the questions put to the witness—that the call for the book and the answers to the questions are essentially connected; that the assignments of error apply the fourth amendment to the orders for the book, and for these reasons, without specifically raising the privilege in the District Court as to the book, there is more than a mere question of fact presented there and the constitutional objections are available on that branch. But we insist that regarding the book the record raises only the question of fact which has been finally adjudged beyond review. If the pe-

titioner wished to contend that the order for the book was covered by the privilege, he should have said so at the hearing before Judge Thompson. He should have said specifically and under oath that he declined to produce the book, because to do so would admit that he had it, would show that he had stated falsely before, might subject him to prosecution and therefore would tend to criminate him; that the order for it was an unreasonable search and seizure, and that he was protected from complying with the order by the fourth and fifth amendments. He made no such claim; he rested on the stubborn adherence to his original statement that the book was not in existence or was not in his possession or under his control. His position in the matter is his fault, due solely to himself; clearly there was nothing before the District Court but the question of fact, viz, whether the book existed and Mr. Ballmann could produce it. That was adjudged and is beyond review, and Mr. Ballmann is not in a position to complain on constitutional or any other grounds here as was pointed out in discussing jurisdiction.

In support of the view that the book episode raises the question of fact only, and is separable from the questions asked, it must be remembered that a caution has been uttered against merging the operation of the fourth and fifth amendments and viewing them as connected under all circumstances. In the *Boyd* case, already cited, the statute compelled production of books and papers by making nonproduction

a confession of liability, and the liability, being to forfeiture of goods for fraudulent importation, was considered by the court to be criminal in its nature. It was held that under such circumstances one who was really himself a defendant would be compelled to be a witness against himself, and that the compulsion constituted an unreasonable search and seizure; that the fourth and fifth amendments are intimately related and throw great light upon each other. But the concurring opinion, delivered by Mr. Justice Miller for the Chief Justice and himself, considered that the statute does not hint at either search or seizure, because the party is not required to surrender the custody of his papers, but only to produce them in court for examination in his presence; that the amendment allows reasonable searches, and, if the thing sought is found, reasonable seizures.

The ground of the concurrence was "that the effect of the act of Congress is to compel the party on whom the order of the court is served to be a witness against himself. * * * But, this being so, there is no reason why this court should assume that the action of the court below in requiring a party to produce certain papers as evidence on the trial authorizes an unreasonable search or seizure of the house, papers, or effects of that party."

> While the framers of the Constitution had their attention drawn, no doubt, to the abuses of this power of searching private houses and seizing private papers, as practiced in England,

> it is obvious that they only intended to restrain the abuse, while they did not abolish the power. Hence it is only *unreasonable* searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under warrants, which were called general warrants, because they authorized searches in any place for any thing. This was forbidden, while searches founded on affidavits, and made under warrants which described the thing to be searched for, the person and place to be searched, are still permitted. I can not conceive how a statute aptly framed to require the production of evidence in a suit by mere service of notice on the party, who has that evidence in his possession, can be held to authorize an unreasonable search or seizure, when no seizure is authorized or permitted by the statute. (116 U. S., p. 641.)

So, here, an order of court requiring the production of evidence by means of books of account before a grand jury, through service of subpœna on one who has that evidence in his possession, can not be deemed an unreasonable search or seizure, since neither search nor seizure is ordered.

(b)

As to the questions.

I pass from the book to the questions, which bring together the different elements of the controversy and present squarely the contention as to the fifth amendment. If the cash-book phase is not disposed of on the aspect just submitted, and is considered by the

court not to be separable but to be indissolubly connected with the two questions, then the case involves both the fourth and fifth amendments.

In *Boyd's* case (*ut supra*) the reason given by the court for connecting the guarantees of the fourth and fifth amendments is that unreasonable searches and seizures are almost always made for the purpose of compelling a man to give evidence against himself, and compelling a man to be a witness against himself throws light on the question, what is an unreasonable search and seizure? The court, finding that forfeiture of property by reason of offenses, though civil in form is criminal in nature, was dealing with a case wherein a defendant on trial was manifestly called on for evidence to convict himself and his goods—not goods, but men whose goods they are, offend and pay forfeit. The relation of the two guarantees in that situation is direct and apparent.

Coming, then, to the questions asked, they are:

> State what on account No. 40, sheet No. 1, on this big ledger now in use in your business, these figures under the word "folio" on the debit side of the account, to wit, 349, 349, 349, 349, 349, and 351 refer to?
>
> Do not these figures 349, in your handwriting, on account No. 140, refer to the folios in your cash book in use in your business in January, 1905?

But there are certain preliminary matters to clear away. It can not justly be said that the district judge in hearing evidence offended against the salutary rule

preserving the secrecy of proceedings before a grand jury. The foreman of the grand jury and three witnesses before the grand jury were examined solely with reference to the one essential point of the witness's contempt of court. They brought out merely the facts that the witness did not produce the cashbook called for by the subpœna, that he said there was no such book used in his business to his knowledge, that nevertheless such book existed and was used, and that he refused to answer the questions asked. This is perfectly proper. If there is any remedy at all for contempt under such circumstances, if a witness before a grand jury is under the least control, the evidence heard is entirely consistent with the general rule of guarding from publicity proceedings before a grand jury. Such cases as this present a necessary exception. The *Counselman* case itself is authority for this proposition. The necessary revelation there of the questions and answers before the grand jury does not appear to have been challenged. It can not be successfully challenged here. Does the rule of secrecy prevent a grand jury from reporting such contempt? No one has ever thought so. Suppose the district judge did not deem it necessary to hear evidence, but proceeded to make his order on the grand jury's report; the witness could not set up his privilege without revealing *pro tanto* the proceedings before the grand jury, and necessarily he would have revealed them just as far as the witnesses in the contempt case did. He would have had to say that he declined to

produce and refused to answer in order to say why, viz, that the book did not exist, and that his privilege protected him. Suppose, finally, a different offense from contempt; suppose a witness before a grand jury attempting openly or secretly to bribe one of its members—would the rule of secrecy prevent any inquiry? It seems to me that the proposition is absurd and refutes itself; but it has been suggested, and may be brought forward here. Every case of contempt inquiry upon report of a grand jury is authority for our view. (*Counselman* v. *Hitchcock, supra; Smith* v. *People*, 20 Ill. App., 591; *People* v. *Kelly*, 24 N. Y., 74; *Cullen* v. *Commonwealth*, 24 Gratt., 624; *State* v. *Nowell*, 58 N. H., 314.) The reason for the rule of secrecy is well stated by Mr. Justice Nelson, sitting on circuit, in the case of *United States* v. *Reed* (27 Fed. Cas., 727, 738):

> The rule is founded upon public policy, to guard against abuses that might arise from a disclosure of their proceedings [the grand jury's] to the accused, and to protect witnesses who may have given evidence before them from being exposed to the ill will and resentment of parties indicted. The permission to disclose in the case of a complaint for perjury, or for the purpose of contradicting a witness, seems to remove every well-grounded objection to the rule.

Later cases are *United States* v. *Terry* (39 Fed. Rep., 355) and *United States* v. *Cobban* (127 Fed. Rep., 713).

Another preliminary point—it has also been suggested that the contempt case itself is criminal, and

that the witness invoked his privilege on that score. Contempt proceedings are *sui generis*, as the court has pointed out; a judgment in contempt is, in effect, a judgment in a criminal case. (*O'Neal* v. *United States*, *ante*.) Let us say that contempt obviously bears a criminal character. It is also true that summoning one charged with contempt as a witness in that case violates the privilege. (*In re Nickell*, 47 Kans., 734.) But how irrelevant and futile is that suggestion here! In the first place, the witness could not have intended to invoke the privilege in *that* behalf, because to comply with the order would not have criminated him, but would have cleared him; and in the next place, he was not a witness at all in the contempt proceedings.

But the witness here does not invoke his privilege under oath, unless after being sworn before the grand jury that oath goes out and attached to him in court when his counsel handed up to Judge Thompson his informal written claim of privilege. He says (rec., p. 15), that on his third appearance before the grand jury on April 10 he set up the privilege under oath. He does not expressly invoke the privilege on the contempt case, on the substantive crime which the grand jury were investigating, or on the possible charge of perjury in testifying to which he may have subjected himself. We are not informed why he invokes the privilege; his claim is most general and vague; it should be clear and specific. We are left to construe and apply the claim ourselves by a process of exhaustion. This I submit, is fatal in itself, under established principles of pleading.

The rule on this point of pleading is thus stated in equity (which follows the law in protecting against self-crimination): If the objectionable nature of the discovery sought appears on the bill, the protection may be claimed by demurrer; if it does not so appear, by plea setting forth the means by which the penalty or forfeiture will be incurred; and if the facts are such as to exclude both demurrer and plea, by answer, which must be equally specific. (Adams' Equity, pp. 2, 4, citing the following authorities showing the necessity of a clear and specific claim: *Parkhurst* v. *Lowten*, 1 Meriv., 391; *Attorney-General* v. *Lucas*, 2 Hare, 566; also *Finch* v. *Finch*, 2 Ves. Sr., 490.) It is significant that in equity, where the object of the bill is discovery of a fraud, the rule is modified and defendant will not be protected on the ground that the fraud sought to be discovered may be indictable as conspiracy at law, unless there is an indictment actually pending or a probability that one will be preferred. The result of an opposite course would be to render the very magnitude of a fraud its protection against redress. (Adams' Equity, as cited; *Chadwick* v. *Chadwick*, 31 Law J., 1853, 329.)

As to perjury.

The demand for close scrutiny of the facts, and for interpretation in the light of sense and reason, is to be emphasized again here. Ballmann does not claim that he will subject himself to a criminal prosecution for perjury, although, as I have said, his counsel intimated before Judge Thompson that this was his reason. *Non constat* if he answers and produces the cashbook that

he could be or would be prosecuted. The Government offered evidence tending to show that he had denied wholly having a cashbook; but it is not to be inferred that his privilege was invoked for that reason; it is not to be inferred that he told a falsehood. On the contrary, the truth of his statement is to be inferred until the contrary appears. Answers to the questions therefore would not imperil him, even if they should reveal that he has a cashbook, for, contrary to the tendency of the Government evidence of a false statement, his reply to the marshal's return does not deny that he has the book; it is evasive, of course; it says that "he denies that on the 8th day of April he refused to produce before said grand jury any book included in the order of the court made on April 7;" he says that "said order [the order of April 8 or April 10] * * * was made without any evidence that your petitioner had a cashbook or other book in his possession or under his control 'showing transactions under the name of A. Smith or A. Johnson.'" (Rec., p. 15.) He therefore repels and explains or qualifies an apparent false statement, and he is clearly and distinctly estopped from setting up now and applying his privilege to a possible charge of *perjury*.

As to the substantive offense under inquiry by the grand jury.

Mr. Ballmann comes nearest to solving the unsettled question for what reason precisely he invoked the privilege, when, in his answers under oath before the

grand jury on April 10, incorporated in his reply to the marshal's return (Rec., p. 15), he refers to a certain proceeding in the Court of Common Pleas of Hamilton County, Ohio. It seems that a certain plaintiff brought a civil suit against the "O'Dell Company" and various persons named as officers, stockholders, owners, and agents, including Ballmann, alleging that the company conducted a scheme of gambling known as a "bucket shop;" that the plaintiff lost money on account of this scheme of gambling by means of bets and wagers on the market price of stocks, grains, and other commodities; that the company "won" the sum lost, which was paid by the plaintiff and received by the company, and therefore he sues to recover it back by virtue of the statutes against gaming of the State of Ohio. The record of this suit was presented by Ballmann in connection with his refusal to answer the questions because of the privilege. It is only a civil suit; it does not suggest that Ballmann has subjected himself to criminal prosecution because of these transactions.

But it appears that under the laws of Ohio (Smith and Ben. Stat., sec. 6934*a*–1) it *is* a criminal offense to keep or to be in any manner connected with a "bucket shop;" and suit may be brought to recover back any money lost therein (secs. 4270, 4271). How can any testimony given by Ballmann before this grand jury be availed of in a civil suit to recover back money lost; or even in a prosecution by the State for the misdemeanor? The grand jurors (save as to perjury com-

mitted while testifying before them) are sworn to secrecy. This court will not presume that a grand juror would appear willingly in a State court and violate the oath he has taken by revealing any testimony given by Ballmann. Suppose a juror should do so? Upon objection by Ballmann or his counsel, the presumption is the court would not permit the juror to testify and thus violate his oath as a juror. And even if a grand juror should be subpœnaed as a witness and should refuse to answer any question as to any testimony given by Ballmann, and the State court should rule that he must answer (an altogether remote possibility), and should attempt to punish him for his refusal, is there any doubt of the power of a Federal court to protect its juror and to release him by the writ of habeas corpus?

Passing these points, however, we have to consider whether the production of the cashbook and direct answer to the questions propounded would reasonably subject Mr. Ballmann to prosecution in any capacity for the substantive offense of which the grand jury was inquiring.

Chief Justice Marshall in the *Burr* case, after stating the true rule (*ut supra*) as to a witness answering, between the two opposing principles of the public interest and the private privilege, applied the rule and ordered the witness to answer. The witness was Burr's private secretary and was questioned before the grand jury as to certain correspondence relating to Burr's supposed treason; if the witness answered he might (it

was claimed) subject himself to prosecution for misprision of treason, or for the misdemeanor with which also Burr was charged. The Chief Justice, showing that it is for the court to determine whether a direct answer to a question will criminate, held that under the circumstances appearing "the question may be answered without implicating the witness, because his present knowledge would not, it is believed, in a criminal prosecution, justify the inference that his knowledge was acquired previous to this trial, or afford the means of proving that fact." The letter concerning which the witness was called on to give evidence was a cipher letter which Burr had written by the secretary—that is, it was in the secretary's handwriting. He was called on to state the meaning of its contents and pleaded the privilege. The precise question was, "Do you understand the contents of this letter?" The Government argument was that it *must* appear that he *may* criminate himself; if he anwers "no," if he be unacquainted with the cipher and innocent, he can not be incriminated; if he say "yes," it can not criminate unless coupled with other questions—he may know the key innocently, he may have acquired knowledge of the cipher long after the letter was written. It has not been shown that it *will* or *may* criminate him, etc. Mr. Wirt said: "What are the limits of '*a tendency to criminate*?' Any question may indirectly and remotely have a tendency to criminate or produce any other effect. The rule they insist on is almighty and boundless; any witness may thereby screen himself from giving evidence

against a person to whom he is attached. Like the Cretan labyrinth, it can never be traced nor pursued; and if the witness once get into it, you never can extricate him from it."

As the court will recall, Burr was charged with treason and with a misdemeanor as well under the neutrality statutes, "setting on foot and providing the means for a military expedition against the territories of a foreign prince with whom the United States were at peace." The Chief Justice states that if the letter contained evidence of treason, a fact not dependent on the witness's testimony and provable otherwise, and if the witness were acquainted with the treason when the letter was written, he may probably be guilty of misprision and therefore ought not to be compelled to answer any question the answer to which might disclose his former knowledge of the contents of the letter; and he then proceeds respecting the misdemeanor as follows:

> But if the letter should relate to the misdemeanor and not to the treason, the court is not apprized that a knowledge and concealment of the misdemeanor would expose the witness to any prosecution whatever. On this account the court was at first disposed to inquire whether the letter could be deciphered, in order to determine from its contents how far the witness could be examined respecting it. The court was inclined to this course from considering the question as one which might require a disclosure of the knowledge which the witness might have had of the contents of this letter when it

> was put in cipher or when it was copied by himself, if, indeed, such were the fact. But on hearing the question more particularly and precisely stated, and finding that it refers only to the present knowledge of the cipher—

the court held, as quoted above, that the witness would not be implicated by answering.

Thus, in that case the witness's knowledge, respecting the time when it was gained, was consistent with innocence, and hence there was no reasonable ground for apprehension to excuse him from testifying. (Vol. 1, Robertson's Burr's Trials, Philadelphia, 1808, pp. 205, 246, and particularly pp. 206, 217, 219, 224, 242–245.)

Judge Lurton, evidently having in mind possible complicity in the substantive offense as the basis of the petitioner's claim rather than perjury, applied Chief Justice Marshall's rule, and held that direct answers to the questions would not reasonably tend to implicate the petitioner and criminate him. I may add to the learned judge's suggestions as follows: The rule operates here on different circumstances from those of Burr's secretary, but the reasoning wholly controls this case, for it is quite apparent that direct answers to the questions would not tend to show any complicity in or guilty knowledge of the offense under investigation. It is possible, though unlikely, that there is no guilty bank servant at all. It is quite possible that he did not deal with Mr. Ballmann's office, or that he did not speculate under the disguises specified, or that Mr. Ballmann did not personally know

him, or did not know his identity in connection with the bank. After the questions are answered, it may be a long road before the real dangers indicated by these alternatives are reached, if they should ever be reached at all. The presumption is that Mr. Ballmann is innocent of guilt respecting the abstraction of the bank's funds. I submit with confidence that the district and circuit courts were right in considering that answers to the questions asked could not reasonably be viewed as criminating the witness, and the privilege could not therefore be interposed to save him from answering.

The court will remark that in Irvine's case there was some testimony showing that an attorney for the defendants had sent for the witness and told him to refuse to answer on the ground of the privilege. There is some hint at a similar situation in this record, for Judge Thompson uses the following language in his ruling on the complaint of the grand jury (Appendix, p. 61):

> There has been a great deal occurring here in the last day or two, in these corridors, which I will not refer to or characterize now, but I will not sit here and permit the grand jury to be hindered in its work, or the witnesses who go before the grand jury to be tampered with, or the interference and obstruction that have been manifest within the last day or two, and I expect to deal with it in a way that will establish a precedent here that shall forbid attempts of this character is the future.

The only reason why Judge Taft in the Irvine case

did not pass upon the motive of the witness in pleading his privilege and on the charge of bad faith was that he considered the criminating effect of the questions clear. His view of the correct rule to be deduced from the American and English authorities is that where the criminating effect of the question is doubtful, the motive of the witness may be considered, for in such case bad faith would tend to show that answer would not subject to prosecution or help to convict of crime.

The criminating effect of the questions here is at most doubtful and there is enough before the court on the matter of *bona fides* to make this an apt case for applying that rule. It seems most probable that the witness merely wishes to avoid annoyance or inconvenience, or does not choose to reveal any of the facts of his doubtful business, or is seeking to shield others from prosecution or publicity or condemnation in some form.

The just conclusions on this record are:

That since the District Court (the Circuit Court on habeas corpus concurring) noticed the claim of privilege but denied it on the ground that to answer the questions does not reasonably tend to criminate, there is nothing properly before this court for review on this proceeding except the questions of constitutional right. If the District court committed reversible error in that ruling, the only remedy is by appeal or writ of error to the proper tribunal on the judgment in contempt.

That whether the privilege be referable to the contempt case itself, to a charge of perjury, or to the offense

under the national banking laws, the petitioner can not avail of it—it was not adequately and specifically invoked. As to the contempt, he was not a witness, as to the perjury he is estopped, as to the substantive offense and the perjury as well it is not reasonable to claim that production of the cashbook and direct answers to the questions will criminate, and liability under the criminal laws of Ohio appears to be a far cry. The court and not the witness must determine whether such claim is reasonable, the court has determined against the claim, and that determination is correct on principle and is sustained by the authorities.

That the guarantees of the Constitution which are interposed, when properly read and construed in the light of all the authorities, do not embrace this case, and do not permit or justify the refusal to produce and answer.

If courts and juries possess any real authority in performing their function to investigate crimes and present and punish offenders, they must be able to compel obedience to regular judicial process and orders. It is difficult to imagine a case which would illustrate more strongly than this, involving as it does a gross violation of the national-bank acts, the necessity for vindicating judicial power and process. Accordingly I submit that the judgment below must be affirmed and the appellant remanded into custody, under the final order of the District Court.

HENRY M. HOYT,
Solicitor-General.

[The record of this case presents the curious anomaly, for some unknown reason, of not containing any one of the three opinions of the courts below. Judge Lurton's two opinions on habeas corpus were submitted to the court by the Government as an Appendix to the motion to advance. Judge Thompson's opinion in the contempt proceeding follows below.]

APPENDIX.

United States District Court, Southern District of Ohio, Western Division.

IN THE MATTER of JOHN W. BALLMANN. } In Contempt of Court.

RULING OF JUDGE THOMPSON ON COMPLAINT OF THE GRAND JURY.

The grand jury comes before the court and presents a written complaint which reads as follows:

> The grand jury for the April term, 1905, respectfully represents to your honor and charges that John W. Ballmann is guilty of contempt of court in this, that—
>
> Whereas, on the seventh day of April, A. D. 1905, said Ballmann was duly served with subpœna to appear before this court and this grand jury, to give testimony in a certain matter then under investigation and pending before said grand jury, and being required by said subpœna to produce a certain cashbook in use in his business did, on the seventh day of April, and also upon the eighth day of April, 1905, being still under the process of this court, and in contempt of the order of this court, and

for the purpose of interfering with the due administration of justice of said court and in said grand jury investigation, wilfully fail and refuse to produce said cashbook.

2nd. That the said John W. Ballmann, on the eighth day of April, 1905, while giving certain testimony before the said grand jury while under process of this court so to do, wilfully and knowingly refused to answer certain questions pertaining to said investigation and material thereto, which said questions are as follows:

"(*a*) State what, on account No. 140, sheet No. 1, on this big ledger now in use in your business, these figures under the word 'folio,' on the debit side of the account, to-wit, No. 349, 349, 349, 349, 349, and 351, refer to?

"(*b*) Do not these figures 349, in your handwriting, on account No. 140, refer to the folios in your cashbook in use in your business in January, 1905?"

Wherefore, said grand jury charges that said John W. Ballmann is in contempt of court, and asks that such proceedings may be had as in the premises are in accordance with law.

Ballmann was summoned before the grand jury as a witness. He had no other relation to the matter under investigation there. He was required to produce a book which was deemed to be pertinent to the investigation which was being prosecuted and he was required to explain certain entries in his ledger used in his business, which would tend to show the use of a certain cashbook. He refused to answer the questions and failed to produce the book, claiming, as I understand—if I am in error counsel will correct me—that no such book existed. I took it to be conceded in the discussion of the matter this morning that he denied before the grand jury the existence of such a book. Am I right?

Mr. McPherson. Yes, sir.

Mr. Shay. To his knowledge?

Mr. McPherson. To his knowledge.

Three of his employees, or three of the young men employed in the business with which Ballmann is connected, or which he is carrying on—whatever his relation to it may be—were called before the grand jury and testified. Their testimony furnished the basis for this complaint on the part of the grand jury, and upon the hearing of the complaint here these witnesses were called and testified before the court reluctantly. They testified before the grand jury yesterday; they testified before the court to-day upon the hearing of this application; and I am convinced by their testimony that there was such a book in existence, and that it was used and employed in this business, and that it was used by Ballmann himself; that it was in existence on Monday of this week, and that it was in the office or the place of business where Ballmann carried on business, or was connected with the business carried on there; that it was used on Monday last in keeping the accounts, making the entries in the books which were necessary, or resorted to, in the conduct of the business Ballmann was carrying on.

The ledger has been produced here, which shows in consecutive series, references to pages, under the head "Folio," of some book from which the entries in the ledger were made.

One of the witnesses, who used these books and made entries in these books, said that these paging figures did indicate the use of this cashbook, but not always; that sometimes they had reference to slips, not to the cashbook; and that the last entries (the last of which, I believe, were made on the 4th of this

month, and the next preceding, to which attention was called, at least, was made on the 3d of April), he thinks, were made from slips and not from this cashbook. But he was asked on the witness stand if he had not testified to the contrary before the grand jury. The witness was evidently embarrassed. The court must put a value upon this testimony, in view of the surroundings of these witnesses and their relation to the respondent here; they are employees in that business and they are testifying against their employer, and they testify with hesitancy and reluctance. One of them—the youngest one, the boy—testified to the same fact; he denied that he had made the statement to the grand jury, but being further pressed, he admitted that he had made the statement to the grand jury. Looking through it all I have no manner of doubt that there was a cashbook in use and employed in this business, and that it was there Monday, and that this clerk, Clements, and Ballmann and Hunt all made entries upon the ledger from the cashbook, and they referred to the page of the cashbook by a number under the heading "folio," although the witness Clements undertakes to say that sometimes slips were used, and he thinks slips were used on the 3d and 4th of this month.

Mr. Ballmann does not testify before the court, and all we have is his general statement before the grand jury that no such book ever existed. He does not come here and say that the book did exist and that he destroyed it, or that somebody had stolen it, or that it had mysteriously disappeared, without fault upon his part, and that he is unable to produce it here. He says nothing of that kind, and I feel constrained to say, upon this evidence, that that book to-day is within his control, if not in his actual possession.

There has been a great deal occurring here in the last day or two, in these corridors, which I will not refer to or characterize now; but I will not sit here and permit the grand jury to be hindered in its work, or the witnesses who go before the grand jury to be tampered with, or the interference and obstruction that have been manifest within the last day or two, and I expect to deal with it in a way that will establish a precedent here that shall forbid attempts of this character in the future.

The second assignment is that Ballmann refused to answer the questions which I have already read. Ballmann is not charged with any offense. He was simply called before the grand jury as a witness and there is nothing in his relation to the matter under investigation that tends to criminate him, or makes any suggestion of criminality, and when the court called his counsel's attention to that, the only suggestion that the court had from counsel was, that if he made a false statement, if he perjured himself when he denied that this cashbook ever had existence, the disclosures called for by these questions might tend to show that he was guilty of perjury in making that statement.

As was well said by counsel, to sustain that view would be simply to enable any man called before a grand jury or any other jury, who desired to withhold evidence that would be material in promoting the ends of justice, to make a statement in answer to the first question—a false statement, or a true one—and then when asked the second question, to say: "If it be assumed that I lied in answer to the first question, the answer to the second question may confirm that charge, may criminate me," and thereby he

exempts himself from giving information. Well, now, if that be the law, I prefer to have some other court say so.

I hold that the complaint of the grand jury is well founded; that Ballmann is in contempt in refusing to answer these questions and in refusing to produce the book called for. I omitted to say that the production of the book was called for by the subpœna that was served upon him, and was again called for when the court made the order—and I will ask the stenographer to read the language of the court—

(The order of the court is read, as follows: "I will make an order now requiring him to produce all books and papers pertaining to the business in which he is engaged, whether as employee or manager or proprietor—the business with which he is connected—all books and papers within his control.")

When that order was made, when that was said by the court, Ballmann was present and acquiesced in it; he was sitting alongside his counsel and his counsel said that an order was not necessary; that he would produce all books; and upon that representation the court went no further, but relied upon compliance with its demand for this book which the grand jury had made and which demand the court had repeated.

The only suggestion now is that if he did have the book Monday, there is nothing to show that he had it yesterday when the subpœna was served and when the court made the order. But I have already covered that. If it was in his possession and under his control on Monday, no showing being made to the contrary except his bald, naked statement before the grand jury that no such book ever existed, and when he is contradicted by his employees, who say that it did exist and

was in his office on Monday, and in view of the character of testimony which they were compelled to give reluctantly, I am justified, I think, in finding that the book is still subject to his control, and the court will order that he must answer these questions and must produce this book; otherwise, he will be committed to jail, the jail of the county of Miami, there to remain until he is willing to answer the questions and to produce the book.

The grand jury has adjourned until 12 o'clock Monday, and the witness must be ready to answer the questions and to produce the book at that time, or his commitment will follow, as indicated by the court.

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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

JOHN W. BALLMANN, APPELLANT,
v.
VIVIAN J. FAGIN, UNITED STATES MARSHAL for the Southern District of Ohio. } No. 627.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

SUPPLEMENTAL AND REPLY BRIEF FOR THE UNITED STATES.

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SUPPLEMENTAL AND REPLY BRIEF FOR THE UNITED STATES.

1.

Materiality of the "perjury," if committed.

I do not mean by suggesting this point to foreclose the Government from just pursuit of Mr. Ballmann on any charge to which he may be legally liable. It is proper to suggest, however, that not every false statement in testifying will support a charge of perjury. The matter to which the false statement relates must be material to the issue and tend to prove a fact bearing on the issue. It is when the false swearing goes to a point the existence or non-existence of which can not affect the question in dispute that it does not tend

to prevent the due administration of justice, and therefore is not perjury. (Whart. Crim. Law, 10th ed., Vol. II, secs. 1245, 1276, 1277; *United States* v. *Shinn*, 14 Fed. Rep., 447; *Pollard* v. *People*, 69 Ill., 153; *Com.* v. *Grant*, 116 Mass., 17.) Here the grand jury were at the first stage of an investigation. The particular matter, though material in one sense and important, was preliminary. The vital elements had not yet been reached. The inquiry at that stage did not perhaps relate to an essential feature going to the heart of the substantive transactions. I simply submit to the court the question whether the false statement as to the cashbook (guarded as it was by references to dates and specific named accounts) was material in the sense of constituting perjury; and whether, therefore, Ballmann's danger on this ground was imaginary or real.

2.

Perjury in testifying is justly excepted from protection and the privilege.

It seems incredible that this could be doubted. The guarantee has existed for nearly a hundred and twenty years, and no one, apparently, has had the hardihood to advance the contrary claim during all that period until now. If the claim is well founded the guarantee must be revised and amended forthwith, for otherwise the wheels of criminal justice will stop. If the provision that no person in any criminal case shall be compelled to be a witness against himself does not refer to past occurrences, and, at all events, includes false

swearing before a grand jury whose investigation itself makes the criminal case in which the privilege is invoked, then all that is necessary to give immunity to crime is to be sworn, to lie deliberately, and then to be silent. That is simply a premium on crime, an invitation to perjury, and a safe defense to the main crime which is under inquiry, for nothing could ever be discovered. Take a very likely case: Only a few witnesses available, but, whether few or many, all friendly to an offender not yet tracked, anxious or willing to shield him, hostile, therefore, to the prosecution. They agree among themselves to swear falsely before the grand jury and then to stand on the privilege on the ground of liability to perjury. Retributive justice would stop entirely and criminals go undiscovered and unwhipped. A deliberate lie under oath, a deliberate crime, in other words, is its own complete protection, and complete protection to the utterer's accomplices or friends respecting the previous offense. Now, I do not doubt that *any* previous offense is within the protection, even, perhaps, a previous perjury in testifying; I mean a perjury, on some judicial occasion, by some written or verbal statement under oath, uttered *before* the grand jury convened and began the inquiry. It can not be doubted that except for the liability to *further* discovery pointed out in the *Counselman* decision, section 860, Revised Statutes, protects a witness from prosecution based on his evidence as fully as the constitutional guarantee. But section 860 excepts "perjury committed in discovering or testifying as

aforesaid." This shows clearly, it seems, that it is not the offense of perjury in itself, committed on some previous occasion, which is excepted, but only perjury in giving the evidence which can not be adversely used—perjury on the immediate occasion, as here, before the grand jury.

In showing why the exemption of section 860 was imperfect and short of the guarantee, the *Counselman* decision did *not* refer to the complete exception of the particular offense—perjury in giving the very evidence barred from adverse use—as an additional reason. This is very significant. I submit that always and necessarily and on unanswerable principle this exception is valid, and that the reason why we do not find, after careful search, numerous or exact authorities on the point is because the underlying doctrine has not been and can not be challenged. The grounds for the exception in morals, law, and social science (as indicated, for example, in Wigmore, *ante* main brief, p. 23) are imperative and irresistible.

Section 860 is a mere condensation of the act of February 25, 1868 (15 Stat., 37). The original bill was introduced in the Senate. There had been no previous legislation on the subject. Neither in the Senate nor the House do the debates throw any light upon the matter. (Cong. Globe, 40th Cong., 2d sess., pp. 950, 951, 1334.) Apparently no one ever doubted the sufficiency of the protection and the constitutionality of the proviso.

The law of the State of Kentucky punishes gambling and exempts witnesses from liability to prosecution for that offense, but excepts perjury from that exemption, like the Federal statute. (Stat. of Kentucky, sec. 1973.) In *Com.* v. *Turner* (Ky.) (33 S. W. Rep., 88), it was stated that the purpose of the legislature is to punish at all hazards the offense of false swearing, and no doubt is expressed as to the validity of this provision. The defendant there, as a witness in another case, had been compelled by the court to answer certain questions against his protest and claim of privilege. He was indicted for false swearing in his answers. The trial court charged the jury that if they found he swore under compulsion they should acquit. This instruction was reversed on appeal, the court holding that the decision of the trial court in the original case that the questions and answers were not under the constitutional protection was conclusive and could not be reviewed by another trial court in a subsequent trial for perjury by a witness in the original case. The court held, however, that while any criminative testimony given by a witness under such circumstances might not be used to convict him in a prosecution for the offense of which he had thus criminated himself, "yet, where he testifies, whether willingly or unwillingly, he must tell the truth or make himself amenable to the law against false swearing."

> Here, then, we find the manifest policy of our laws to punish, under all circumstances, this heinous offense of false swearing. By the

> express terms of the statute the witness in these cases who may criminate himself is not only exempted from prosecution for the particular offense disclosed by his testimony, but this testimony can be used against him for no other offense except that of false swearing or perjury. The policy is a sound one and in the interest of good morals, and for the protection of society should be upheld and fostered by the courts (p. 89).

Many English statutes contain similar provisions as to perjury. In *Queen* v. *Hulme* (L. R. 5 Q. B., 377), which arose under the Corrupt Practices Prevention Acts (15 and 16 Vict., c. 57; 26 and 27 Vict., c. 29), Blackburn, J., referring to the proviso that no statement made by a witness in proceedings under these acts should be admissible in evidence in any proceeding, civil or criminal, except in cases of perjury, said (p. 385):

> I think it is clear that whenever the legislature in this act requires a person to answer questions the meaning is that he shall answer them truly, to the best of his knowledge and belief; it is clear also in this act that where the witness gives false evidence in answer to any question he shall be liable to be indicted for perjury. I think it is clear the obligation intended to be thrown upon the person who is called as a witness is that he shall answer every question truly.

It appeared that under these acts a witness was not excused from answering on the ground that he might thereby tend to criminate himself, but was entitled to a certificate of indemnification stating that he had

made true disclosure, etc., which should operate as a stay to any proceedings that might be instituted against him *for violation of the election laws* (the previous substantive offense). As to these features of the law, and replying to the contention that the law did not require every answer to be true, Lush, J., said (p. 389):

> At common law a person, having a question put to him the answer to which may tend to criminate himself, can excuse himself from answering. The legislature says, in order to get at the truth in these matters, he shall not have that excuse, he shall be bound to answer; and, further, it says that if he gives a false answer to any question put to him, he shall be liable to the pains and penalties of perjury, a further measure in order to enforce speaking the truth, enabling the commissioners to elicit information. I should be very much surprised to find in an act of Parliament which made a false answer a criminal offense anything which would amount to a premium upon giving a false answer; it was intended to make up to the witness for what they have taken away from him in the way of common-law privilege. Whereas at common law a witness is excused from answering a question the answer to which would tend to criminate himself, because if he gave the answer it might be used as evidence against him, it is said, "You shall answer, but no statement made by you in answer to any question put shall, except in cases of indictment for perjury, be admissible against you in evidence in any case, either civil or criminal." * * *

So that a witness may be indicted for perjury. The general principle of protection from the consequences of evidence furnished by himself does not protect him here. On the same principle he can not refuse to answer on the ground that he will reveal his own perjury, committed earlier in the same examination. As to the liability for prosecution for perjury, the point has frequently been decided in this country. For instance, in *State* v. *Faulkner*, a recent case. (Supreme Court of Missouri, 75 S. W. Rep., 116; see also *Mackin* v. *People*, 115 Ill., 312.) In the *Faulkner case* the grand jury was investigating charges of municipal bribery, and the witness swore he knew nothing of a certain corruption fund. In fact, he had knowledge of the fund and the purpose for which it was to be used. He was indicted for perjury and convicted. The point was made on his behalf that a witness in his situation—that is, not under arrest for a crime, but summoned before the grand jury in the investigation of the guilt of others—could fail to claim his constitutional privilege, or waive it, and testify falsely and be absolutely exempt from prosecution for perjury. The court said:

> The proposition, reduced to its last analysis, is that, as no person can be compelled to testify against himself, he may waive his privilege, testify falsely, and yet incur no liability for perjury. In another form it may be stated that, since he can not be compelled to incriminate himself, and as by testifying falsely he does incriminate himself by committing perjury,

> therefore he can not be prosecuted for it. Two answers readily suggest themselves to this proposition that the witness in such circumstances is justifiable in committing perjury, and they are these: First, he may refuse to answer, and, if the court shall deny his privilege, and commit him, he can be released on habeas corpus; or, second, if he yield to the order of the court, and testify truthfully, and his truthful evidence leads to his indictment, it can not be used against him on the trial. So that two lawful avenues are open to him by which he may avoid the road to perjury and a prosecution therefor. (75 S. W. Rep., p. 137.)

And in the *Mackin case* the court said:

> Such an investigation would be utterly futile, and even a farce, if witnesses might testify falsely and no perjury could be assigned on such corrupt and false testimony. * * * Unless witnesses, when called before the grand jury in such cases, can be compelled to speak the truth, it would be impracticable to detect crime. The very object of the inquest is to ascertain whether crime has in fact been committed. (*Mackin* v. *The People*, 115 Ill., at pp. 323, 324.)

When in the *Faulkner case* the Supreme Court of Missouri said, "If he yield to the order of the court, and testify truthfully, and his truthful evidence leads to his indictment, it can not be used against him on the trial," it means, of course, an indictment for the substantive offense into which the grand jury are inquiring. It may be that the witness here could have

refused to answer at the outset any question whatever, on the ground that he would criminate himself; but it is impossible to sustain the contention that, having chosen to answer after being sworn, and stating a deliberate and willful falsehood, he is then exempt in the same proceedings either from prosecution for his perjury or from the necessity of revealing it by being compelled to answer other questions. In other words, he may be prosecuted for perjury, and yet he can not invoke his privilege to save himself from that prosecution. If that danger here is real, the appellant has chosen to run the risk and must take the consequences; he can not avail of his own deliberate offense to protect himself from its results.

To state the proposition in another form—the reason for excepting perjury from the exemption is manifestly this: The object of such statutes is to enable the Government to obtain information as to crimes that have been committed. The constitutional privilege is overcome by protecting the witness against the effects of his disclosures. But if he could testify falsely with impunity, the object of the statute would be defeated, the desired information could not be obtained, and he would receive without consideration the benefit of the exemption. In other words, he would be enabled, by the statute itself, to thwart the administration of justice by committing another crime—perjury—without fear of punishment. If the danger of exposing oneself to the charge of perjury, by reason of previous answers in the same judicial examination, were a valid

reason for a witness refusing to answer other questions, then a witness could, by previously testifying falsely (as I have already pointed out), make privileged matters which otherwise would not be privileged. And that is this case, if, as Ballmann's counsel suggested before Judge Thompson, the reason for his refusing to answer the questions put by the grand jury as to the reference of the folio numbers on the ledger, is that he may have committed perjury in previously denying the existence of the cash book.

Perjury is not only a crime in all codes of law, but false swearing is a sin in codes which are religious, as well as legal and political—like the Ten Commandments. Not only is the coming of the witness essential to the safety and health of the community's life and the continuous transaction of its affairs, but his veracity is essential when he comes. Irresistible considerations of public policy, which underlie the law, demand that false swearing shall be punished and that false swearing shall not block the machinery of justice.

I believe the fundamental proposition here was established and determined, *ex necessitate*, long before modern codes of law were framed, and that it controls their interpretation; but, so far as it may be argued that this proposition is undetermined, I submit to the reason and conscience of the court this final statement: That a constitutional guarantee against self-incrimination in any criminal case, although such a case includes a grand jury's inquiry respecting other parties than the witness, necessarily refers to previous unlawful

transactions and can not include deliberate false swearing before the grand jury itself at an earlier stage of the same examination.

It is significant that the amended and complete protection against prosecution or penalty under the interstate-commerce laws approved in *Brown* v. *Walker*, contains the same exception as to perjury. The opinion in that case did not consider the exemption defective on that account.

3.

The opposing brief.

Appellant contends (Brief, Subdivision IV) that there was evidence before the District Court suggesting that an answer to the question or the production of his books might implicate the witness:

1. On the ground that he "was already charged with criminal contempt for having failed to produce a cash book before the grand jury on the day before and on the morning of the same day, and was subject to be further prosecuted, if he had any books in his possession, for disobedience of the sweeping order of April 7, which directed him to produce all books."

This is simply saying that his disobedience of the first order of the court was a justification of his refusal to obey its final order. It is manifest that the object of all these orders was the production of the cash book, and he was adjudged in contempt only for failing to produce that book specifically referred to by the final order.

2. On the ground that the testimony of Dieterle, the foreman of the grand jury, disclosed "that Ballmann

had testified before the grand jury that he had not used a cash book in his business during December, 1904, and January, February, March, and April, 1905," and "an affirmative answer to the questions propounded by the grand jury, or the production of a cash book, might, therefore, have led to the indictment and conviction of the witness for perjury."

Here, again, he relies upon his own wrongful act in the same investigation to protect him in committing a further wrong and make privileged matters not otherwise privileged. The question of the admissibility of this plea of perjury has been already discussed.

3. Because Oppenheimer's petition and other similar suits pending against him in the Ohio courts showed that he was being civilly sued to recover back losses under the statutes of Ohio against gambling and bucket shops, and that he was charged in verified petitions with being engaged in an unlawful business.

The obvious answer to this claim is that this evidence was not before the District Court. The facts here stated were first set up in the petition to the Circuit Court for a writ of *habeas corpus.* It is submitted that these statements have been improperly injected into the case. The question before the Circuit Court upon habeas corpus, and before this court upon this appeal, is whether, *upon the evidence before it,* the District Court had jurisdiction to commit Ballmann for contempt.

But supposing that such evidence were admissible, appellant's argument fails:

(1) Because no connection is shown between the questions asked and the criminal proceedings suggested.

(2) Because disclosures made before a Federal grand jury could not be used in prosecutions in the State courts. (See original brief, pp. 48, 49.)

As to the contention that the existence of the cash book was not proved.

The existence of the book was proved by Ballmann's own employees. The District Court merely held that there was no evidence to show that it had been destroyed. This is very far from holding that the existence of the book was to be assumed from the failure of the appellant to show that it had not been destroyed.

The courts below did not in this respect assume guilt and require Ballmann to establish his innocence. The fact of the existence of the book having appeared, they merely held, and legitimately, that it was incumbent on him to explain its disappearance or state why he could not. They held, rightly, that when the existence of the book had been found as a fact, he could not take refuge in absolute silence.

Section 860, Revised Statutes, does not protect the voluntary statements of witnesses.

Exception is taken to Foreman Dieterle's evidence that Ballmann had testified before the grand jury that he had not used a cash book in his business.

It is not contended, as it could not be, that testimony as to what took place before the grand jury was inadmissible in this contempt case. (See 17 A. and E. Ency. Law, 2d ed., p. 1294, and cases cited.) A most

instructive and well-considered case in this connection is *State* v. *Broughton*, 7 Ired. (29 N. C.), 96. (See also *People* v. *Northey*, 77 Cal., 618; *People* v. *Kelley*, 47 Cal., 126; *People* v. *Young*, 31 Cal., 564; *United States* v. *Kirkwood*, 5 Utah, 123; *People* v. *Reggel*, 8 Utah, 21, holding that the rule of secrecy is not for the benefit of witnesses.)

Appellant contends, however, that section 860, Revised Statutes, protects him against the use against himself of anything that he disclosed before the grand jury, and therefore the foreman's testimony as to what he said was inadmissible.

But what he said, so far as testified to by the foreman, was said voluntarily, and therefore is not protected by section 860, any more than by the rule of the common law.

This was expressly held in *Tucker* v. *United States*, (151 U. S., 164), where the court, quoting the language of section 860, said:

> "Discovery or evidence obtained from a party or witness by means of a judicial proceeding" includes only facts or papers which the party or witness is compelled by subpœna, interrogatory, or other judicial process to disclose, whether he will or no; and is inapplicable to testimony voluntarily given, or to documents voluntarily produced. The clause as to discovery or evidence is conceived in the same spirit as the Fifth Amendment of the Constitution, declaring that no person shall be compelled in any criminal case to be a witness

against himself; and as the act of March 16, 1878, c. 37 (20 Stat., 30), enacting that a defendant in any criminal case may be a witness at his own request, but not otherwise, and that his failure to make such request shall not create any presumption against him. *Boyd* v. *United States*, 116 U. S., 616; *Wilson* v. *United States*, 149 U. S., 60; *Lees* v. *United States*, 150 U. S., 476. [~~This sentence is unended in the report, but its purport is clear.~~]

See also *United States* v. *Kimball* (117 Fed. Rep., 156). In that case it was held that evidence voluntarily given by a witness before the grand jury, which was investigating the failure of a national bank, could be made the basis of an indictment against him (the president) without violating section 860.

Upon the proposition that it is for the court and not the witness to determine whether a direct answer to a question will tend to criminate the witness, I desire to call the court's attention to the following cases in addition to those cited in the original brief:

Wyckoff, Seamans & Benedict v. *Wagner Typewriter Co.* (99 Fed., 158).

Foot v. *Buchanan* (113 Fed., 156).

Respectfully submitted.

HENRY M. HOYT,
Solicitor-General.

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No. 627. 240.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

In re BALLMAN.

OPINIONS BY LURTON, J., IN U. S. CIRCUIT COURT, SOUTHERN DISTRICT OF OHIO.

OPINION OF JUDGE LURTON.

It is to be borne in mind that I am not sitting as upon an appeal or writ of error from the order made by Judge Thompson. This is simply an application to me, as one of the Judges of the Circuit Court, to inquire into the validity of the action of a judge of co-ordinate jurisdiction in ordering the commitment of the petitioner for a refusal to obey the order of the Circuit Court.

In such a case, the only inquiry admissible is, whether, in making the order imposing the punishment, the Court acted within its jurisdiction. If the Court did not exceed its jurisdiction, that is an end of the matter, upon this kind of hearing. If, having jurisdiction, the Court erred in law or fact, that must be corrected by a writ of error to the Circuit Court of Appeals, or to the Supreme Court of the United States, as the case may be.

The findings of fact, if the Court had jurisdiction, are not open to review on a writ of habeas corpus; but when, as in this case, the contention is that the Court exceeded its jurisdiction, it is admissible to examine the record of commitment including the evidence, if made part of the record by bill of exceptions, or other

order of the Court, to see whether jurisdiction existed to make the order which has been disobeyed.

If jurisdiction depended upon evidence of a state of facts, then the absence of any evidence which would justify the order made, would demonstrate the failure of jurisdiction and render the order of commitment void.

There are two distinct and separable orders complained of:

1. There is the order to produce a particular cash book. The objection to this order is, as I understand it, that a subpena *duces tecum* which issued on the 7th day of April, is claimed to have required him to produce a cash book showing transactions under the name of A. Smith and A. Johnson, during the months of December, 1904, and January and February, 1905, and it is urged that no evidence appears that petitioner ever had in his possession or under his control any such cash book showing transactions with Smith and Johnson; that the order disobeyed and for which the petitioner stands committed, had no broader basis than disobedience of the subpena of April 7th.

There might be some room for the contention, if the witness had simply denied that he had any book showing any such transactions; but when the defendant appeared before the grand jury in pursuance of this subpena upon the 7th day of April, he failed then to produce the cash book desired and inquired of by the grand jury. Thereupon, the grand jury prepared a charge of contempt. Now, this is the first complaint

of the grand jury; and this was made on the 7th day of April:

> "The grand jury for the April term respectfully represents to Your Honor and charges that John W. Ballman is guilty of contempt of court in this, to-wit: that upon the 7th day of April, A. D. 1905, a subpoena in due form was served upon said John W. Ballman, commanding him to appear forthwith before this Court and said grand jury, to give testimony concerning a certain matter then under investigation before said grand jury and to produce at said time and place the cash books, ledgers, letter-press copybooks and sheets showing the transactions as conducted under the names of A. Smith and A. Johnson with said John W. Ballman, during the months of December, 1904, and January and February, 1905.
>
> "Said John W. Ballman appeared before said grand jury in obedience to said subpoena, but failed, and still fails and refuses to produce before said grand jury the aforesaid books and papers.
>
> "The said papers and books are material to an investigation being conducted before said grand jury."

Now, upon the basis of that report made by the grand jury to the Judge of the Circuit Court, this order was made:

> "This day came the grand jury for the April term and presented its charges of contempt of Court against John W. Ballman, in writing, signed by the foreman of said grand jury.

"Thereupon came into open court the said John W. Ballman, in person and by his counsel, and thereupon the Court ordered and directed said John W. Ballman forthwith to produce all books and papers pertaining to the business in which he is engaged, whether as an employer or manager or proprietor—the business with which he is connected,—all books and papers within his control.

"It is now directed that the above order be entered upon the journals of this court as of April 7, 1905."

Now, upon the next day the grand jury again reported:

"The Grand Jury for the April Term, 1905, respectfully represents to Your Honor and charges that John W. Ballman is guilty of contempt of court in this, that—

"Whereas, on the 7th day of April, A. D. 1905, said Ballman was duly served with subpena to appear before this court and this grand jury, to give testimony in a certain matter then under investigation and pending before said grand jury, and being required by said subpena to produce a certain cash book used in his business, did, on the 7th day of April and also upon the 8th day of April, 1905, being still under the process of this court, and in contempt of the order of this court, and for the purpose of interfering with the due administration of justice of said court and in said grand jury investigation, wilfully fail and refuse to produce said cash book.

"That the said John W. Ballman, on the 8th day of April, 1905, while giving certain testimony before the said grand jury while under process of this court so to do wilfully and knowingly refused to answer certain questions pertaining to said investigation and material thereto,"—

—passing over those questions for the time being. Thereupon, evidence was heard and the Court made the order of April 8th. Now that order is in these words:

"The charges of contempt presented by the grand jury upon the 8th day of April, 1905, came on to be heard upon the evidence and the arguments of counsel, and after due consideration the Court finds that the said John W. Ballman is guilty of contempt of the process and orders of this Court, as charged in said information filed by said grand jury, in the following particulars, to-wit:

"First: That the said John W. Ballman has knowingly failed and refused to produce to and before said grand jury a certain cash book used by him in the conduct of his business and which said cash book is in his possession or under his control.

"Second: That the said John W. Ballman has wilfully refused to answer before said grand jury certain questions material to an examination pending before said grand jury, with reference to said cash book, as is specifically charged in the information filed against him.

> "Wherefore, it is considered, ordered and adjudged by the Court that said John W. Ballman produce the said cash book and answer the questions set out in said charges of contempt, at twelve o'clock, noon, Monday, April 10th, 1905, before said grand jury, and in default thereof, that he be committed to and confined within the jail of Miami County, at Troy, Ohio, until he complies with the order of this Court, or is discharged by due process of law."

Now, on the 10th of April, the grand jury made a third report:

> "The Grand Jury for the April term, 1905, reports that John W. Ballman appeared as a witness before this body April 10, 1905, at 1:30 o'clock P. M., and failed and refused to produce the cash book referred to in Your Honor's order of April 8th, 1905. Said witness also refused to answer the questions as specified in the charges against him and referred to in said order of Court."

This was followed by the order of April 10, committing Mr. Ballman until he should purge himself of contempt.

The order of April 8 and the order of April 10, plainly referred to a cash book used in the business of the witness, concerning which he had been examined. Touching that book, the witness before the grand jury said:

"Will you state what he said—" I am reading from the examination of the foreman of the grand jury be-

fore Judge Thompson, as to the testimony of the witness Ballman before the grand jury—

> "Will you state what he said with reference to a cash book being used in his business, during the months of December, 1904, and January and February and March and up to April 6th, 1905?"

Passing over objections made to the competency of the question, the Court ruled him to answer. The witness answered:

> "The question was asked and he said there was no such book, to his knowledge."

But in respect of this book, other evidence was heard by the grand jury and heard by Judge Thompson from certain of Ballman's clerks or co-employes, which evidence tended to show that prior to Monday, April 3, there had been a cash book used in the business, upon which entries of cash received and cash paid out, had been made.

I will not undertake to state what this evidence was; it was descriptive of the character of book, the size of it, length of it, breadth of it, the kind of entries made upon it and by whom the entries were made. This evidence strongly tended to show that the petitioner had had a cash book which had been used in his business during the months of December, 1904, and January, February, March and down to April 3, 1905, and that this book was still either in his possession or under his control. Its loss or disappearance was not claimed by the witness, the petitioner, nor by

any of the witnesses examined in respect to it. It had disappeared from the office desk, and in the light of this evidence, most of it unwilling evidence from those associated with the petitioner in business, such a book was in his office upon April 3, and had been there for an indefinite time prior thereto. The Circuit Court might well assume that that book was still in the possession or under the control of Mr. Ballman. It certainly made a case in which he was called upon to show, if such was the fact, that the book described in the evidence, to which the order of April 8 and the order of April 10, referred, had been lost or destroyed after the date when it was last seen in Mr. Ballman's possession, or in his office.

I am not able to see that the order of April 7 was so broad as to be void under the Fourth Amendment, concerning unreasonable searchs and seizures. Thar order must be construed, interpreted and read in the light of the proceedings and of the inquiry which had been made before the grand jury of him, and of the requirement of the subpena *duces tecum*. No objection was then made upon the ground that it was an unreasonable search or seizure; he did produce his other books and papers used in his business, except only a cash book which had also been used in his business.

The subsequent order of April 8, was limited to this cash book, the cash book to which the evidence before Judge Thompson and the evidence before the grand jury, had been directed, and that order is the order which the petitioner has disobeyed and for which he stands committed.

My conclusion therefore is that Judge Thompson did not exceed his jurisdiction by requiring the production of a book, which, evidence showed to be in the possession or under the control of the petitioner.

Now, the question of privilege: I am unable to see that a direct answer to the questions which petitioner refused to answer will reasonably have a tendency to criminate the witness. Now, those questions are as follows:

> "State what, on Account No. 140, Sheet No. 1, on this big ledger now in use in your business, these figures under the word 'folio,' on the debit side of the account, to-wit: No. 349/349, 349, 349, 349 and 351, refer to?
>
> "Do not these figures 349, in your handwriting, on Account No. 140, refer to the folios in your cash book in use in your business in January, 1905?"

Now, the witness declined to answer these questions upon the ground that an answer would have a tendency to criminate him.

I am satisfied with the view of the law as laid down by Circuit Judge Taft, in a similar case to this, in which he was hearing a case upon a writ of habeas corpus, the case of *Ex Parte* Irvine [74 Fed. 954] where he said a witness cannot avoid answering any question by the mere statement that the answer would tend to criminate him, without regard to whether the statement is reasonable or not. On the contrary it is for the judge, before whom the question arises, to decide whether an answer thereto may reasonable have

a tendency to criminate the witness or to furnish proof, an element or a link in the chain of evidence necessary to convict him of crime.

And so Chief-Justice Marshall stated the rule to be as follows:

> "When a question is propounded it belongs to the Court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be * * * because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows and which he claims."

Now, a direct answer to the first question would be an answer to the inquiry as to what, on Account No. 140 of this big ledger—that refers to one of petitioner's books used in his business, which he did produce, a ledger then in use in his business—what these figures under the word "Folio" on the debit side of the account refer to. Folio 349, 349, 349, 349, 349 and 351 are the figures.

Now, in what way will a direct answer to that question reasonably tend to criminate the witness? Plainly it is intended to elicit an explanation of what book is referred to, or what slip is referred to by these figures under the word "Folio" and no direct answer possibly or reasonably could furnish a link in a chain of

evidence. Now, that that is the meaning of that question is plainly indicated by the other—"Do not these figures in your handwriting refer to the folios in your cash book?" He could answer that but in one of two ways—yes or no; they either do refer to the cash book, or they do not, and it undoubtedly is intended to elicit the same result—do these figures refer to the pages of another book? The first is, what book in plain meaning—for we must interpret the questions also in the light of the kind of inquiry which was being made; this witness had been asked to produce a certain book; he had said that that book did not exist to his knowledge, and now that answer is being tested by further questions growing out of certain entries, in his own handwriting on another book which he had produced. Of course, it is obvious that a witness who has answered a question in one way, cannot say, "If I am further questioned, if I am further examined about that matter, I may criminate myself by making inconsistent answers." That would permit every witness to close his mouth when he found himself about to be cornered.

I therefore come to the conclusion that a direct answer to these two questions would not reasonable tend to implicate the petitioner or criminate him.

Now, something has been said about the indefiniteness—the indefinite character of this order of contempt. I think that order of contempt is a commitment until he shall obey the order of the Court, which order of the Court is, that he shall appear before the present grand jury and produce to that grand jury the book

inquired about, and answer the questions which he has declined to answer. When the sessions of that grand jury end, this order of commitment is at an end, because he cannot then purge himself of contempt. The Court, instead of committing him for a definite time, thirty, sixty or ninety days, as a punishment, has chosen to commit him until he shall appear and answer, and he is only to appear and answer—when he will have purged himself of contempt; and if the opportunity to appear and to produce the book and answer, the questions, is gone, by the dissolution of that grand jury, the order of commitment is at an end.

I therefore direct that the writ of habeas corpus be denied and that the petitioner be committed to the custody of the marshal.

OPINION OF JUDGE LURTON.

This matter comes on again to be heard upon an application by the petitioner, Ballman, for an appeal to the Supreme Court of the United States on the judgment of the Circuit Court remanding him to the custody of the marshal.

I think the case is one that is appealable direct to the Supreme Court of the United States, because it is a case arising under the constitution of the United States, and therefore, falls under Clause four of Section five of the Judiciary Act of 1891.

There is also an application that pending this appeal, petitioner be admitted to bail. Now, a proceeding under a writ of habeas corpus, is a proceeding *sui generis*, and there are special provisions of the statutes of congress which regulate a litigation of this character. Sec. 761 provides that—

> "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

Then Sec. 763 provides that—

> "From the final decision of any court, justice, or judge inferior to the circuit court upon

> an application for a writ of habeas corpus or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard."

Of course that means when a case is being heard before a district court and under an old provision, by which the circuit court had a certain limited appellate power over the district court; but Sec. 764 provides that—

> "From the final decision of such circuit court an appeal may be taken to the supreme court in the cases described in the last clause of the preceding section."

Now, Sec. 765 provides:

> "The appeals allowed by the two preceding sections shall be taken on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be in prison or confined or restrained of his liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, as may be prescribed by the Supreme Court, or, in default thereof, by the court or judge hearing the case."

Now, the Supreme Court have adopted a rule which as far as it goes, is a regulation under Sec. 765, and it has been pressed upon me by counsel who represent the government in this case, that under that the appellant is not entitled to bail—that rule being No. 34, with respect to the custody of prisoners, as follows:

Writ of habeas corpus:

> "Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed."

And the second clause of that rule:

> "Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance as hereinafter provided."

Now, this case does not fall under the first clause of Rule 34, which to read it again, is as follows:

> "Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed."

Now, if I had not granted the writ of habeas corpus in this case, the custody of the prisoner, with the marshal of this court, would, under this rule, not be disturbed; he would be in custody by virtue of the order of the district court committing him to the marshal; but the writ of habeas corpus was granted; therefore, it comes under the second clause, which I have read.

Now, no other provision has been made by the Supreme Court, under Sec. 765, but under that section, he may be enlarged under recognizance, subject to

provisions hereinafter made—which have not been hereinafter made, but may be made in default of provisions or regulations made by the Supreme Court, by the court or judge hearing the case.

Now, in the case of Roberts v. Reilly, a question of similar character came before Judge Spear for the court of the southern district of Georgia, and he allowed an appeal to the Circuit Court, which was then admissible under the law, upon certain regulations, upon certain conditions, and that order that he then made is found in the case of Roberts v. Reilly, 116" U. S., 80, and it met with the approval of the Supreme Court—because the case went subsequently to the Supreme Court, upon appeal from the judgment of the Circuit Court—and the Court there considered the whole subject of the peculiar character of appeal of habeas corpus proceedings. The Court say:

> "This statutory provision evidently contemplates the summary character of proceedings under the writ of habeas corpus as not admitting, in favor of the liberty of the citizen, the delays usually and necessarily attending ordinary litigations between parties, and confers upon the judicial tribunal or the judge hearing the application and making the order which is the subject of the appeal, discretion to send up the case to the appellate tribunal, under such regulations and orders as may seem best adapted to secure the speediest and most effective justice."

It is therefore my conclusion in this case that I have the authority and the power to allow an appeal, under

conditions and regulations; and the authority and the power to allow the petitioner to go upon bail, pending that appeal.

Now, I have considered the suggestion that this appeal, if allowed, operates to defeat the ordinary course of justice; that the grand jury is in session, and that there must come a time when its sessions must have an end, and that the order which is complained of in the writ of habeas corpus is an order requiring this petitioner to appear and produce a certain document and to answer certain questions, and that the object of justice may be defeated if this appeal be allowed. Of course that cannot affect the question. The law has no regard for persons. If the petitioner is entitled to an appeal it does not make any difference what the consequences are—he must have the law administered, so far as it is, favorably to him, and justly, whether favorably or unfavorably; so the appeal must go, but I have the right to allow it upon conditions; and upon the question of bail, I do not think there is any absolute requirement—using the word "absolute" in its most significant sense—that he shall be allowed to go upon bail pending the appeal; but the statutes of the United States are framed upon the theory that one charged with an offence, convicted of crime or disobedience of an order of the court, is entitled, pending a final hearing in whatever court he may choose to take it, which has jurisdiction—until it is finally determined that he is guilty, or that he must obey the order of the court—the whole theory of the

statutes of the United States is that such person shall go upon bail.

The Circuit Court of Appeals of this circuit have had that question under consideration in the case of McKnight v. United States, 113" Federal Reporter, 451, in which the statutes upon the subject of bail pending writs of error, on conviction of crime, have been considered. In that case, where bail pending a writ of error to the Circuit Court of Appeals was denied by the trial judge, an application for bail was made to the Circuit Court of Appeals, and in consideration of the whole theory of the statutes of the United States that such persons shall not be confined if they are able to give sufficient security for appearance until the case shall finally and ultimately be determined, we admitted him to bail in that case. We only gave expression to the principle laid down by Mr. Justice Gray, in the case of Hudson v. Parker, where he said:

> "The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo punishment, but may be admitted to bail, not only after arrest and trial, but after conviction, pending a writ of error."

Now, heartily concurring in that statement and that construction of the statutes of the United States, I think it is just as applicable to a case arising under the writ of habeas corpus as it is to a case that comes up under a writ of error; and therefore, having regard to

the power of the court to make regulations, and looking to the peculiar character of such a case as this, I direct that an appeal be allowed, upon conditions: That this appellant shall file in the Supreme Court of the United States within ten days from this date a full transcript of this record, and that in the meantime he be committed to the custody of the marshal, and that he may execute a bond in the sum of five thousand dollars before the clerk of the circuit court, conditioned to abide by the judgment of the Supreme Court in this case—until the determination of the questions arising under appeal to the Supreme Court of the United States; but putting this condition upon the allowance of this appeal, namely: That he shall file this transcript within ten days of this date, and that court may, if it see fit, advance the hearing of this case so that speedy justice may be had, and a final determination of the constitutional questions herein involved may be had. An order will be drawn accordingly in the habeas corpus proceeding.

Now, an application has been made for a writ of error to the Supreme Court of the United States in the case of the commitment of John W. Ballman in the District Court. That application is made to me as one of the Circuit judges of this circuit. That judgment upon which this writ of error is sought to be taken, is a judgment of the District Court, and that is a very distinct court from the Circuit Court. I am not a judge of the District Court for the Southern District of Ohio; I have no authority to sit in that court. Rule 36 of the

Supreme Court of the United States, has been cited, as prescribing that a writ of error or an appeal may be allowed, in term time or in vacation, by any justice of this court (that is, the Supreme Court), or by any circuit judge within his circuit, or by any district judge within his district, from the circuit Court or the district court direct to the Supreme Court, and it is insisted that under that rule, a circuit judge has power and authority to grant a writ of error. If that power and authority exist to grant a writ of error to the Supreme Court of the United States, it exists wholly by virtue of this Rule 36; that is its only authority. I doubt very much whether a proper interpretation of that rule is intended to confer upon circuit judges—to say nothing of the question as to whether the Supreme Court can, by rule, delegate to a circuit court judge, authority to grant a writ of error to that court. In contemplation of law, a writ of error issues from the appellate tribunal to the subordinate tribunal. If I were a member of the Supreme Court, I might, as a member of that court, grant a writ of error—if this were an application for a writ of error—to the Circuit Court of Appeals; I might, as a member of the Circuit Court of Appeals, grant a writ of error to the Circuit Court; and if I were a District Judge I might grant a writ of error to the Supreme Court of the United States, or to the Circuit Court of Appeals; but I have grave doubts whether I have authority as one of the Circuit judges, to grant a writ of error the Supreme Court

of the United States; I therefore decline to do that; I leave that matter to be determined by Judge Thompson. It is not a matter of significance whether it is granted today or Monday, because the absence of Judge Thompson from the city is the only reason given for coming to me with this application for writ of error. We all know that his absence at Columbus is only a short one, and inasmuch as Mr. Ballman will be under an appeal bond in the writ of habeas corpus and be out from under the authority of the order of commitment, it is not significant or a matter of any moment to the petitioner whether he now has a writ of error allowed from the District Court, or not. I therefore decline to act upon that, because it is a matter of no great importance whether it be allowed today or Monday, in view of my ruling upon the other question.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 308.

JOHN W. BALLMANN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED JUNE 21, 1905.

(19,810.)

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INDEX.

	Original.	Print.
Caption.....(omitted in printing)..	1	—
Complaint of grand jury.....(" ")..	1	—
Order to produce books and papers, etc....(" ")..	3	—
Charges of contempt by grand jury....(" ")..	3	—
Order to produce book and answer questions.(" ")..	5	—
Order to give bond .....(" ")..	6	—
Recognizance.....(" ")..	6	—
Report of grand jury.....(" ")..	7	—
Answers of John W. Ballmann.....(" ")..	7	—
Copy of petition in case No. 126,824, Hamilton county common pleas court (omitted in printing).....	8	—
Order of arrest.....(omitted in printing)..	11	—
Final commitment.....(" ")..	11	—
Order allowing bill of exceptions.....(" ")..	12	—

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 17, 1905.

	Original.	Print
Bill of exceptions.....(omitted in printing)..	13	—
Colloquy between court and counsel...(" ")..	13	—
Testimony of George F. Dieterle .....(" ")..	15	—
Thomas J. Clements.....(" ")..	17	—
Frank M. Kramer.....(" ")..	25	—
Elmer S. Hunt.....(" ")..	34	—
George F. Dieterle (recalled) (omitted in printing).....	38	—
Colloquy between court and counsel...(omitted in printing)..	39	—
Judge's certificate to bill of exceptions.(" ")..	42	—
Exhibit F—Summons.....(" ")..	42	—
G—Refusal to answer.....(" ")..	42	—
H—Account .....(" ")..	42*a*	—
I—Account .....(" ")..	42*b*	—
Certificate of Judge Thompson.....(" ")..	43	—
Exhibit No. 1—Report of grand jury..(" ")..	43	—
No. 2—Refusal to answer .....(" ")..	44	—
No. 3—Petition in Oppenheimer *vs.* The O'Dell Company *et al.* (omitted in printing)	44	—
Petition for writ of error and assignment of errors.....	47	1
Order of Supreme Court of the United States allowing writ of error and supersedeas	51	3
Supersedeas bond	52	3
Certificate to transcript	54	5
Writ of error	55	5
Citation and service.....	56	6
Stipulation to omit part of record in printing.....	58	6

* * * * * * *

1–47 And afterwards, to-wit: on the 3rd day of June A. D. 1905, a petition for writ of error and assignment of errors was filed in the clerk's office of said court clothed in the words and figures following, to-wit:

District Court of the United States, Southern District of Ohio, Western Division.

In the Matter of JOHN W. BALLMAN. No. 1840.

Petition for Writ of Error and Assignment of Errors.

The defendant, John W. Ballman prays for a writ of error from the Supreme Court of the United States to review the judgment and orders of the court in the above entitled proceeding, and assigns as error:

1. That the order entered April 10, 1905, as of April 7, requiring him to produce all books and papers within his control, is repugnant to the fourth and fifth amendments of the Constitution of the United States.

2. That the order of April 8, requiring him to answer certain questions concerning his ledger, which had been obtained from him by means of a judicial proceeding, is repugnant to section 860 of the Revised Statutes of the United States.

3. That the judgment committing him for contempt for refusing to answer said questions, notwithstanding his claim that an answer thereto might tend to criminate him, is repugnant to the fifth amendment of the Constitution of the United States and to section 860 of the Revised Statutes of the United States.

48 4. That there was no legal evidence to support the finding in the order of April 8th that he had said cash-book in his possession or under his control and that he had knowingly failed and refused to produce it before the grand jury.

5. That the judgment and orders committing him for contempt were made without any legal evidence to support them and are beyond the power or jurisdiction of the court and are null and void.

6. That the court erred in refusing to grant his motion to be discharged on the ground that no legal evidence of contempt had been offered and that no legal charge had been preferred against him.

7. That no legal charge of contempt was preferred against him, or legal proceedings to punish him for contempt instituted against him, and that the court was without jurisdiction to render judgment or to make any of said orders.

8. That the judgment and proceedings are without due process of law and null and void.

9. That the court refused him a reasonable opportunity to secure counsel and prepare for the hearing, and required him to proceed without a specific information and without due process.

10. That the judgment and the order of commitment are illegal and void, because they are indefinite and uncertain, and because the punishment inflicted is indeterminate, and in violation of the Constitution and laws of the United States.

11. That the court erred in receiving the following evidence:

49 (*a.*) The testimony of George F. Dieterle as to defendant's testimony before the grand jury concerning a cash-book, viz:

"Q. Will you state what he (Ballmann) said with reference to a cash book being used in his business during the month of December, 1904, and January and February and March and up to April 6, 1905?

A. The question was asked, and he said there was no such book to his knowledge."

(*b.*) The defendant's ledger and accounts No. 133 and 140 thereon being Exhibits H and I which ledger had been obtained from him by means of a judicial proceeding, and in using the same against him in this proceeding.

(*c.*) The testimony of Clements and of Hunt and of Kramer concerning said ledger.

(*d.*) The testimony of Clements that said ledger was posted from a cash book and that it showed folios of a cash book, and that certain figures thereon indicated pages of a cash-book and that other figures thereon indicated cash slips, viz: the figures 382 in account No. 133, Exhibit I, and that certain entries on said ledger were in defendant's handwriting, viz: the entries under date of January 26, 27 and 30, 1905, in account No. 140, Echibit H:

(*e.*) The testimony of Hunt that said ledger was in defendant's office on April 6 and 7, 1905, and that the witness made entries thereon on April 5th or 6th, 1905, and the meaning of said entries and of the word folio, and other words and figures on said ledger.

(*f.*) The testimony of Clements that a cash book was used in the conduct of defendant's business.

50 (*g.*) The testimony of Clements that a cash book was used for the purpose of posting the ledger in defendant's office.

(*h.*) Evidence of what the witnesses Clements, Kramer and Hunt, testified defore the grand jury, and particularly what they testified before the grand jury concerning said ledger and the meaning of figures thereon, and concerning a cash-book and the contents and use thereof.

(*i.*) Other hearsay and incompetent testimony.

(*j.*) The testimony of Clements, Hunt and Kramer concerning books other than those called for by the subpœna of April 7, 1905.

(*k.*) In permitting the district attorney to examine said witnesses as upon cross-examination, and to impeach their testimony.

The defendant prays that the judgment and orders of this court in this proceeding may be reversed, and that he may be admitted to

bail pending the judgment of the Supreme Court on his writ of error.

JOHN W. BALLMANN.

LAWRENCE MAXWELL, JR.
THOMAS F. SHAY.
MILLER OUTCALT.

51 And afterwards, to-wit: on the 3rd day of June A. D. 1905, an order of the Supreme Court, was filed in the clerk's office of this court, clothed in the words and figures following, to-wit:—

Order of Supreme Court, October Term, 1904.

JOHN BALLMANN
vs.
THE UNITED STATES.

* * * * * * *

On consideration of the application for a writ of error herein.

It is now here ordered by the court that said writ of error be, and the same is hereby, granted, to operate as a supersedeas on plaintiff in error giving bond, conditioned according to law, in the penal sum of $5,000, to be approved by the judge of the district court of the United States for the southern district of Ohio.

May 29th, 1905.

A true copy.
Test:
[SEAL.] JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

52 And afterwards, to-wit: on the 3rd day of June, A. D. 1905, a supersedeas bond was filed in the clerk's office of said court clothed in the words and figures following, to-wit:

Supersedeas Bond.

UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division.

We, John W. Ballman and George H. Yearger and Robert J. O'Brien, jointly and severally acknowledge ourselves indebted to the United States of America in the sum of five thousand dollars, lawful money of the United States of America, to be levied on our and each of our goods, chattels, lands and tenements upon this condition.

Whereas the said John W. Ballman has sued out a writ of error from the judgment of the district court of the United States for the southern district of Ohio, western division, in the contempt proceed-

ings in said court against the said John W. Ballman for a review of said judgment in the Supreme Court of the United States:

Now if the said John W. Ballman shall appear and surrender himself in the district court of the United States for the southern district of Ohio, western division, on and after the filing in the said district court of the mandate of the Supreme Court, and from time to time thereafter, as he may be required, to answer any further proceedings and abide by and perform any judgment or order which may be had or rendered thereafter in said case, and shall abide by and perform any judgment or order which may be rendered in the Supreme Court of the United States, and shall pay the damages and costs awarded against him, then this obligation shall be void,
53 otherwise to remain in full force and virtue.

Witness our hands and seals this 3rd day of June, 1905.

JOHN W. BALLMANN.
GEORGE H. YEARGER.
ROBERT J. O'BRIEN.

Taken and approved this 3rd day of June 1905, before me.

A. C. THOMPSON,
Judge of the United States District Court,
Southern District of Ohio.

UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, }

I George H. Yearger one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth ten thousand dollars in real estate in my own name; situate in the county of Hamilton in said district.

GEORGE H. YEARGER.

Sworn to before me 22nd day of April 1905.

JOHN R. SHINDEL,
[SEAL.] Notary Public, Hamilton County, Ohio.

SOUTHERN DISTRICT OF OHIO, ss:

I, Robert J. O'Brien, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities, I am worth ten thousand dollars in real estate in my own name, situate in the county of Hamilton in said district.

ROBERT J. O'BRIEN.

Sworn to before me the 22nd day of April 1905.

[SEAL.] JOHN R. SHINDEL,
Notary Public, Hamilton County, Ohio.

54 THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Western Division, }

I, Benjamin R. Cowen, clerk of the district court of the United States, within and for the district and division aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above entitled cause as the same appears of record and on file in the clerk's office of said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Cincinnati, Ohio, this 7th day of June A. D. 1905.

[Seal United States District Court, Southern Dist. Ohio.]

B. R. COWEN, Clerk,
By ROB'T C. GEORGI,
Deputy Clerk.

55 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judge of the district court of the United States for the southern district of Ohio, western division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court before you, between The United States, plaintiff, and John W. Ballmann, defendant, in proceedings for contempt, a manifest error hath happened, to the great damage of the said John W. Ballmann as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 29th day of May, in the year of our Lord one thousand nine hundred and five.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
MELVILLE W. FULLER,
Chief Justice of the United States.

[Endorsed:] No. 1840. United States district court, southern district of Ohio, western division. In the matter of John W. Ballman. *Ex parte.*

56 UNITED STATES OF AMERICA, ss:

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the district court of the United States for the southern district of Ohio, western division, wherein John W. Ballmann is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 29th day of May, in the year of our Lord one thousand nine hundred and five.

MELVILLE W. FULLER,
Chief Justice of the United States.

Service acknowledged June 3, 1905.
SHERMAN T. McPHERSON,
United States Attorney, S. D. O.

57 [Endorsed:] No. 1840. United States district court, southern district of Ohio, western division. In the matter of John W. Ballman. *Ex parte.*

58 Supreme Court of the United States, October Term, 1905.

JOHN W. BALLMANN, Plaintiff in Error,
v.
THE UNITED STATES. } No. 308.

Stipulation.

Whereas the matter appearing from pages one (1) to forty-six (46), inclusive, in the transcript of the record herein is identical with that already printed in the transcript of the record in the case of John W. Ballmann, appellant, v. Vivian J. Fagin, etc., No. 240, now before the court, it is hereby stipulated by and between counsel for the parties herein that the same may be omitted in the printing of the record herein.

LAWRENCE MAXWELL, JR,
Counsel for Plaintiff in Error.
H. M. HOYT, Solicitor General.

November 8, 1905.

59 [Endorsed:] File No. 19810 Supreme Court U. S. October term, 1905 Term No. 308. John W. Ballmann, pl'ff in error, vs. The United States. Stipulation to omit part of record in printing. Filed Nov. 13, 1905.

Endorsed on cover: File No. 19,810. S. Ohio D. C. U. S. Term No. 308. John W. Ballmann, plaintiff in error, vs. The United States. Filed June 21st, 1905. File No. 19,810.

FILE COPY.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

No. 308.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOHN W. BALLMANN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOHN W. BALLMANN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 308.

MOTION TO ADVANCE.

Comes now the Solicitor-General, on behalf of the United States, and moves the court to advance this case for hearing during the present term.

It is unnecessary to state the facts in the case other than to say that this is a writ of error sued out to review the judgment of the District court in the contempt proceeding which is now before the court on habeas corpus in *Ballmann* v. *Fagin*, argued on May 8 last.

In order that, if the Government shall prevail in the habeas corpus proceeding, the grand jury at Cincinnati may continue its investigation of the matter before it when the alleged contempt arose, and not be delayed by the pendency of the writ of error, it is desired that this case be advanced, so that it may be disposed of at the same time as the habeas corpus case.

10403—05

It is believed that the briefs in the habeas corpus case discuss substantially all the questions presented on this writ of error, and the Government is willing to submit the case, if advanced, on the briefs already on file. If opposing counsel file an additional brief, it would desire an opportunity to reply, if so advised.

Notice of this motion has been served and proof of service filed with the clerk.

H. M. Hoyt,
Solicitor-General.

O

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

FILE COPY.

Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 308.

JOHN W. BALLMANN, *Plaintiff in Error,*

vs.

THE UNITED STATES, *Defendant in Error.*

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF FOR THE PLAINTIFF IN ERROR.

Printed by JAMES BARCLAY, 108-118 Canal St., Strobridge Building, Cincinnati, Ohio.

Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 308.

JOHN W. BALLMANN, *Plaintiff in Error*,

vs.

THE UNITED STATES, *Defendant in Error*.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT AND ASSIGNMENT OF ERRORS.

Ballmann's proceeding in habeas corpus, now under submission on appeal (No. 627 October term, 1904), presents the question whether the judgment of the district court, committing him for contempt, is void. This writ of error presents the question whether it is erroneous.

We rely upon the following errors assigned in the petition for the writ:

1. That the order entered April 10, 1905, as of April 7, requiring Ballmann to produce all books and papers within his control, is repugnant to the fourth and fifth amendments of the Constitution of the United States.

2. That the order of April 8, requiring him to answer certain questions concerning his ledger, which had been obtained from him by means of a judicial proceeding, is repugnant to section 860 of the Revised Statutes of the United States.

3. That the judgment committing him for contempt for refusing to answer said questions, notwithstanding his claim that an answer thereto might tend to criminate him, is repugnant to the fifth amendment of the Constitution of the United States and to section 860 of the Revised Statutes of the United States.

4. That there was no legal evidence to support the finding in the order of April 8th that he had said cash book in his possession or under his control and that he had knowingly failed and refused to produce it before the grand jury.

5. That the judgment and orders committing him for contempt were made without any legal evidence to support them and are beyond the power or jurisdiction of the court and are null and void.

6. That the court erred in refusing to grant his motion to be discharged on the ground that no legal evidence of contempt had been offered and that no legal charge had been preferred against him.

7. That no legal charge of contempt was preferred against him, or legal proceeding to punish him for contempt instituted against him, and that the court was without jurisdiction to render judgment or to make any of said orders.

8. That the judgment and proceedings are without due process of law and null and void.

9. That the court refused him a reasonable opportunity to secure counsel and prepare for the hearing, and required him to proceed without a specific information and without due process.

10. That the judgment and the order of commitment are illegal and void, because they are indefinite and uncertain, and because the punishment inflicted is indeterminate, and in violation of the Constitution and laws of the United States.

11. That the court erred in receiving the following evidence:

(a) The testimony of George F. Dieterle as to defendant's testimony before the grand jury concerning a cash book, viz:

"Q. Will you state what he [Ballmann] said with reference to a cash book being used in his business during the months of December, 1904, and January and February and March and up to April 6, 1905?

A. The question was asked, and he said there was no such book to his knowledge."

(b) The defendant's ledger, and accounts No. 133 and 140 thereon, being Exhibits H. and I. which ledger had been obtained from him by means of a judicial proceeding, and in using the same against him in this proceeding.

(c) The testimony of Clements and of Hunt and of Kramer concerning said ledger.

(d) The testimony of Clements that said ledger was posted from a cash book and that it showed folios of a cash book, and that certain figures thereon indicated pages of a cash book and that other figures thereon indicated cash slips, viz: the

figures 382 in account No. 133, Exhibit I., and that certain entries on said ledger were in defendant's handwriting, viz: the entries under date of January 26, 27 and 30, 1905, in account No. 140, Exhibit H.

(e) The testimony of Hunt that said ledger was in defendant's office on April 6 and 7, 1905, and that the witness made entries thereon on April 5th or 6th, 1905, and the meaning of said entries and of the word folio, and other words and figures on said ledger.

(f) The testimony of Clements that a cash book was used in the conduct of defendant's business.

(g) The testimony of Clements that a cash book was used for the purpose of posting the ledger in defendant's office.

(h) Evidence of what the witnesses Clements, Kramer and Hunt testified before the grand jury, and particularly what they testified before the grand jury concerning said ledger and the meaning of figures thereon, and concerning a cash book and the contents and use thereof.

(i) Other hearsay and incompetent testimony.

(j) The testimony of Clements, Hunt and Kramer concerning books other than those called for by the subpoena of April 7, 1905.

(k) In permitting the district attorney to examine said witnesses as upon cross-examination, and to impeach their testimony.

ARGUMENT.

We refer to the pages of the printed record in Ballmann, Appellant, vs. Fagin, No. 627, October term, 1904. The

proceedings in the district court are incorporated into that record (pp. 17-48) and have therefore by stipulation been omitted in printing the record in this case.

Ballmann was committed by the district court (1) for refusing to answer two questions, and (2) for failing to produce a cash book. His excuse for refusing to answer the questions was that an answer might criminate him and that he was therefore protected from answering by the fifth amendment of the Constitution of the United States. We submit that question, which also arises on this writ of error, on our brief and argument in Ballmann vs. Fagin, and confine this brief to questions arising upon Ballmann's failure to produce a cash book, and to errors of the district court in receiving evidence in disregard of section 860 of the Revised Statutes.

I.

The specifications were in writing, and did not charge contempt in failing to produce any books except those called for by the subpoena of April 7.

It will probably be conceded that in a criminal proceeding, based on written charges, the inquiry is confined to those charges.

In In re Reese, 107 Fed. 942, 948 (C. C. A. 8th Cir.), the court, after quoting from the decisions of this court and of other courts, in which it is held that a proceeding for contempt is in the nature of a criminal proceeding, and to be governed by the rules of construction which prevail in criminal cases, said:

"It follows from these well recognized principles that the petitioner was entitled to be informed of the nature and cause of the accusation against him, and to be tried on the charge as made, and on no other charge."

The court of appeals in that case affirmed the order of the

circuit court discharging Reese on habeas corpus, on the ground that the contempt for which he had been committed was not charged in the motion for commitment. The court of appeals said that the trial court had "no authority on that motion to punish him for some other offense not therein charged against him."

In Parkhurst vs. Kinsman, 2 Blatchf. 76; Fed. Cas. No. 10759, the circuit court for the southern district of New York held that in proceedings in contempt for disobedience of an injunction the proofs "must be limited to the particular offences alleged against the defendant."

The charges filed on April 7 are found at p. 18 of the record and are as follows:

"The grand jury for the April term (1905) respectfully represents to your honor and charges that John W. Ballmann is guilty of contempt of court in this, to-wit: that upon the 7th day of April, A. D. 1905, *a subpoena in due form* was served upon said John W. Ballmann, commanding him to appear forthwith before this court and said grand jury, to give testimony concerning a certain matter then under investigation before said grand jury, and to produce at said time and place the cash books, ledgers, letter press copy books and sheets *showing the transactions as conducted under the name of A. Smith and A. Johnson with said John W. Ballmann*, during the months of December, 1904, and January and February, 1905.

Said John W. Ballmann appeared before said grand jury *in obedience to said subpoena*, but failed, and still fails and refuses to produce before said grand jury the *aforesaid* books and papers.

The said papers and books are material to an investigation being conducted before said grand jury."

The only charge was that Ballmann failed to obey the subpœna of April 7. No other process had been served on him.

The charges filed on April 8, are found at p. 19 of the record and are as follows:

"The grand jury for the April term (1905) respectfully represents to your honor and charges that John W. Ballmann is guilty of contempt of court, in this, that

Whereas on the seventh day of April, A. D. 1905, said Ballmann was duly served with subpoena to appear before this court and this grand jury, to give testimony in a certain matter then under investigation and pending before said grand jury, and being required *by said subpoena* to produce a *certain* cash book in use in his business, did, on the seventh day of April and also upon the eighth day of April, 1905, being still under the process of this court, and in contempt of the order of this court, and for the purpose of interfering with the due administration of justice of said court and in said grand jury investigation, wilfully fail and refuse to produce *said* cash book," etc.

What follows relates to the refusal of the witness to answer the two questions

Disobedience of the subpoena of April 7 was the only charge made. Disobedience of the omnibus order of April 7 requiring Ballmann to produce all books and papers pertaining to his business, which is found at pp. 18 and 19 of the record, was not charged, and could not have been intended, for that order was not entered until April 10, and was not made until after the filing of the first contempt charges. It was not known to the grand jury.

The Government's evidence was also confined to the failure to produce "a cash book which was called for by his subpoena." It is as follows, Rec. 27:

"Q. Mr. Dieterle, state whether or not on yesterday, in the investigation before the grand jury, Mr. Ballmann produced a cash book *which was called for by his subpoena?*

A. He did not.

Q. Will you state whether or not, on this morning, before

said grand jury, he produced said cash book *which he was called upon to produce in his subpoena?*

A. He did not."

The order of April 8, at p. 20 of the record purports to be based upon the written charges:

"The charges of contempt presented by the grand jury upon the eighth day of April, 1905, came on to be heard upon the evidence and the arguments of counsel, and after due consideration the court finds that the said John W. Ballmann is guilty of contempt of the process and orders of this court, *as charged in said information filed by said grand jury*, in the following particulars, to-wit:

First. That the said John W. Ballmann has knowingly failed and refused to produce to and before said grand jury a *certain* cash book used by him in the conduct of his business, and which said cash book is in his possession or under his control.

Second. That said John W. Ballmann has wilfully refused to answer before said grand jury certain questions material to an examination pending before said grand jury, with reference to said cash book, as is specifically charged in the information filed against him.

Wherefore, it is considered, ordered and adjudged by the court that said John W. Ballmann produce the *said* cash book," etc.

It is thus seen that the written charges of contempt, the Government's testimony, and the order of April 8, all relate to books called for by the subpoena of April 7.

II.

The subpoena of April 7 was confined to books and papers "showing transactions under the name of A. Smith and A. Johnson."

The solicitor general does not dispute this proposition. At page 2 of his brief in the habeas corpus appeal, after saying that Ballmann's examination before the grand jury was "to

bring out the relations to his establisment of a supposed speculative customer passing under the names of A. Smith and A. Johnson," he adds:

"The subpoena (issued April 7) required him to produce a cash book among other documents *showing transactions under those names.*"

Again at p. 37 he says:

"The subpoena directed Ballmann to bring his books, including the cash book, *showing accounts in certain names.*"

The subpoena is at p. 43 of the record. It requires Ballmann "to bring cash book, ledger, letter press copy books and all sheets showing transactions under the name of A. Smith & A. Johnson during months of Dec. 1904 & Jan. & Feb. 1905."

There was a suggestion, at the oral argument of the appeal, that the words "showing transactions, etc." qualified only the words "letter press copy books and all sheets." But that is an unnatural and strained construction. The grand jury were evidently investigating transactions *under certain names, during certain months,* and called for "cash book, ledger, letter press copy books and all sheets," relating to transactions under those names during those months. They did not call for anything else. If the words "showing transactions under the name of A. Smith and A. Johnson" do not qualify "cash book and ledger," neither do the words "during months of Dec. 1904 and Jan. and Feb. 1905," and there is no specification whatever of the cash book and ledger required. The subpoena would be void for indefiniteness.

In Privett vs. Presley, 62 Ind. 491, the appellant had been committed for failing to comply with an order of the court requiring him to deliver to the sheriff "all the goods covered by the mortgage of the plaintiff received by him from Thomas W. Harris, or account to the plaintiff for the value

thereof." The supreme court of Indiana discharged the appellant on habeas corpus, saying, p. 494:

"The goods which the appellant was thus ordered to deliver were not described or identified, nor was their value stated. A judgment in such terms, would as we think, be a nullity. The order in question is not less so. Nothing material is settled by it. The question what goods the appellant received from Thomas W. Harris is left open and undetermined. Perhaps the appellant knew what goods he received from Harris; but is the knowledge of the appellant to be relied upon to aid this defect in the order? Might there not be a dispute or controversy as to what goods were thus received by the appellant, and might it not be claimed that there were more goods thus received than there really were?

III.

There was no evidence that Ballmann ever had any book "showing transactions under the name of A. Smith and A. Johnson."

This proposition is not disputed.

In our brief in Ballmann vs. Fagin we have discussed the further proposition that there was no evidence, sufficient to justify a finding in a criminal proceeding, that Ballmann had *any* cash book in his possession, when the subpoena of April 7 was served on him. But we consider that question immaterial. The only book called for was one "containing transactions under the name of A. Smith and A. Johnson." Wilful failure to produce a book answering that description was the only charge with which Ballmann was confronted, and we need not inquire whether he had some other book.

IV.

Ballmann purged the contempt as to the book, under oath.

In Rex vs. Sims, 12 Mod. 511, the court said:

"If one brought in, in contempt, deny all upon oath, he is of course, discharged of the contempt; but if he has forsworn himself, he may be prosecuted for perjury."

Blackstone, after saying that the rule in proceedings in contempt in equity is that the sworn answer of the party charged with contempt may be contradicted and disproved *by affidavits of the adverse party*, adds:

"Whereas in the courts of law the admission of the party to purge himself by oath is more favorable to his liberty, though perhaps not less dangerous to his conscience; for, if he clears himself by his answers, the complaint is totally dismissed." 4 Bl. Com., 286, 287.

Rapalje, after quoting the foregoing passage from Blackstone, says:

"The doctrine thus laid down is still the rule followed by courts which proceed according to the common law, those courts uniformly holding that if one accused of a constructive contempt fully answers all the charges, on his oath, he must be discharged; the answer must be taken as true, and extrinsic evidence can not be received to impeach it." Rapalje on Contempt, sec. 119.

United States vs. Dodge, 2 Gall. 313; Fed. Cas. No. 14,975, was a process of attachment before Mr. Justice Story and district judge Duval for a contempt of the respondent in forcibly rescuing a prisoner in the custody of the marshal. The court said:

"We can not receive any collateral evidence as to the offence, but if the respondent, by his affidavit, and answers on oath to interrogatories proposed by the district attorney, discharges himself of the contempt, no further proceedings can be had against him on the attachment. If, from any collateral evidence, it should appear that there is reason to believe the respondent has perjured himself, we will recognize him to answer, at the next term of the court, to such matters as may be found against him. See, as to contempts and

practice thereon. Vin. Abr. "Contempts." A., B; Prac. Reg. 99, 100; Gilb. Com. Pl. 20, 21; 12 Mod. 511; Mod. Cas. 73; Com. Dig. "Chancery," D. 3; Salk. 321; 4 Bl. Comm. 283; Rex vs. Horsley, 5 Term R. 362; 3 Hawk. P. C. bk. 2, c. 22, secs. 1, 32-34; 1 W. Bl. 640; Wyatt's Reg. 138; 2 Burrows, 796; Doug. 516; Bac. Abr. 'Attachment,' B."

In In re Pitman, 1 Curt. 186; Fed. Cas. No. 11,184. Mr. Justice Curtis said:

"Now one of the most important privileges accorded by the law to one proceeded against as for a contempt, is the right to purge himself, if he can, by his own oath. So rigid is the common law as to this, that it does not allow the sworn answers of the respondent to be controverted, as to matter of fact, by any other evidence. U. S. vs. Dodge [Fed. Cas. No. 14,975]. 'If the party can clear himself upon oath he is discharged.' 4 Bl. Comm. 286, 287."

The cases are considered and the doctrine approved by circuit judges Caldwell and Thayer in Boyd vs. Glucklich, 116 Fed. 131, 140, 141.

The district court, before passing sentence on Ballmann, was duly advised by the foreman of the grand jury that Ballmann made the following answer in writing to and in the presence of the grand jury:

"I have not now and neither at the time nor at any time since the service of the first subpoena upon me in this matter have I had in my possession or under my custody or control the book referred to in the order of the court entered on April 8, 1905, or any book showing transactions under the name of A. Smith or A. Johnson, and am unable to produce the same." Rec. 22.

V.

The District Court erred in receiving evidence in contravention of Section 860 of the Revised Statutes of the United States.

The section is as follows:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture."

In Tucker vs. United States, 151 U. S. 164, 168, it was held that "discovery" or "evidence," within the meaning of section 860, includes facts or papers which a witness is compelled to produce or disclose by subpoena, interrogatory, or other judicial process, and that the section is conceived in the same spirit as the fifth amendment.

The following evidence was received, in violation of the section:

1. The testimony of foreman George F. Dieterle as to defendant's testimony before the grand jury concerning a cash book, viz:

"Q. Will you state what he [Ballmann] said with reference to the cash book being used in his business during the months of December, 1904, and January and February and March and up to April 6, 1905?

A. The question was asked, and he said there was no such book to his knowledge." Rec. 27.

The testimony was not received for the purpose of proving that Ballmann had failed to produce a cash book. Dieterle had already testified to that fact. Rec 27. It was offered, and received, for the purpose of comparing Ballmann's testimony before the grand jury with the testimony of his clerks at the trial in the district court, concerning the existence and

use of a cash book, in order to discredit him, and to show that he was guilty of subterfuge. But his testimony before the grand jury could not be used for that purpose under section 860.

2. Ballmann's ledger, having been obtained from him by means of a judicial proceeding, could not be used against him in the contempt proceeding. But the court used entries in it against him for the purpose of proving the existence of a cash book, and received the testimony of Clements and Hunt and Kramer concerning those entries for the same purpose.

Clements was permitted to testify, over the defendant's objection, that the ledger was posted from a cash book (Rec. 28, 29, 31), and that it showed folios of a cash book (Rec. 29, 31), and that certain figures thereon indicated the pages of a cash book (Rec. 29, 30), and that other figures thereon indicated cash slips, to-wit: the figures 382 in Account No. 133 (Rec. 29, 30), and that certain entries on the ledger were in defendant's handwriting, to-wit: the entries under date of January 26, 27, and 30, 1905, in account No. 140, shown at p. 44 of the record. Rec. 31, 32.

Hunt was permitted to testify that the ledger was in defendant's office on April 6 and 7, 1905 (Rec. 39), and that the witness made entries thereon on April 5 or 6, 1905, and the meaning of those entries and of the word folio, and other words and figures on the ledger. Rec. 39, 40.

Section 860 forbade the use of his ledger, obtained from Ballmann under the order of April 7, or of the testimony of witnesses improperly offered by the Government concerning entries thereon. Ballmann objected to its introduction as evidence and duly excepted. Rec. 41.

We call attention also to the course of the district attorney in offering evidence, clearly incompetent, of what his witnesses had testified before the grand jury concerning Ball-

mann's books (Rec. 30, 34, 35, 36, 37, 39). The court not only received this testimony, but itself put the following question to the Government's witness Kramer (Rec. 36):

"What did you tell the grand jury?"

VI.

The Defendant was denied a reasonable opportunity to prepare for the trial, with the assistance of counsel.

It appears from the bill of exceptions that Ballmann was taken from the grand jury room directly into court. The proceedings open with his appeal for delay until he could get counsel. Rec. 25. He had not been served with process or with a copy of the charges against him. The judge ordered the grand jury to retire and announced that he would "hear this application as soon as Mr. Ballmann can get his counsel here." Rec. 25. Counsel appeared and requested "that the charges made against John W. Ballmann be shown to him," and the court graciously granted time for counsel "to examine the complaint." Counsel requested time to prepare and to get his witnesses. The court did not consider witnesses necessary, and refused an adjournment until the afternoon to allow counsel to examine the law of the case. He was evidently forced to trial without an opportunity to do more than to read the complaint hurriedly.

This was not the due process of law which the fifth amendment prescribes, nor the "assistance of counsel for his defense" which the sixth amendment guarantees.

In Boyd vs. Glucklich, 116 Fed. 131, 134 (C. C. A. 8th Cir.), the court said:

"Dispatch in judicial proceedings is commendable, but, in proceedings involving the liberty of a citizen, he has a right not only to be informed of the precise claim against him, but, after receiving that information, he has a right to

a reasonable time to prepare his answer and present his proofs, and, lastly, to be heard by counsel on the law and facts of the case. While proceedings in bankruptcy may be summary, they should not be too summary; in other words, they should not be so summary as to deprive the bankrupt of those fundamental rights and privileges that belong to every citizen, among which are the right to be advised of the demand made upon him, and the right, after being so advised, to have a reasonable time to prepare his defense and produce his witnesses. The bankrupt act does not do away with these rights, and no citizen forfeits them by being adjudged a bankrupt. The bankrupt act contemplates that proceedings in bankruptcy shall go forward with all reasonable dispatch compatible with the due and orderly administration of justice and a proper regard for the fundamental rights of the citizen."

VII.

The Court has jurisdiction of the writ of error.

The court itself allowed the writ. A judgment of conviction in contempt proceedings may be reviewed on writ of error. Bessette vs. W. B. Conkey Company, 194 U. S. 324. The case involves the construction and application of the Constitution of the United States and was therefore properly brought directly to this court. Motes vs. United States, 178 U. S. 458.

We respectfully submit that the judgment of the district court should be reversed.

LAWRENCE MAXWELL, JR.,
THOMAS F. SHAY,
MILLER OUTCALT,
Counsel for the Plaintiff in Error.

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Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 308.

JOHN W. BALLMANN, *Plaintiff in Error,*

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THE UNITED STATES.

BRIEF IN REPLY

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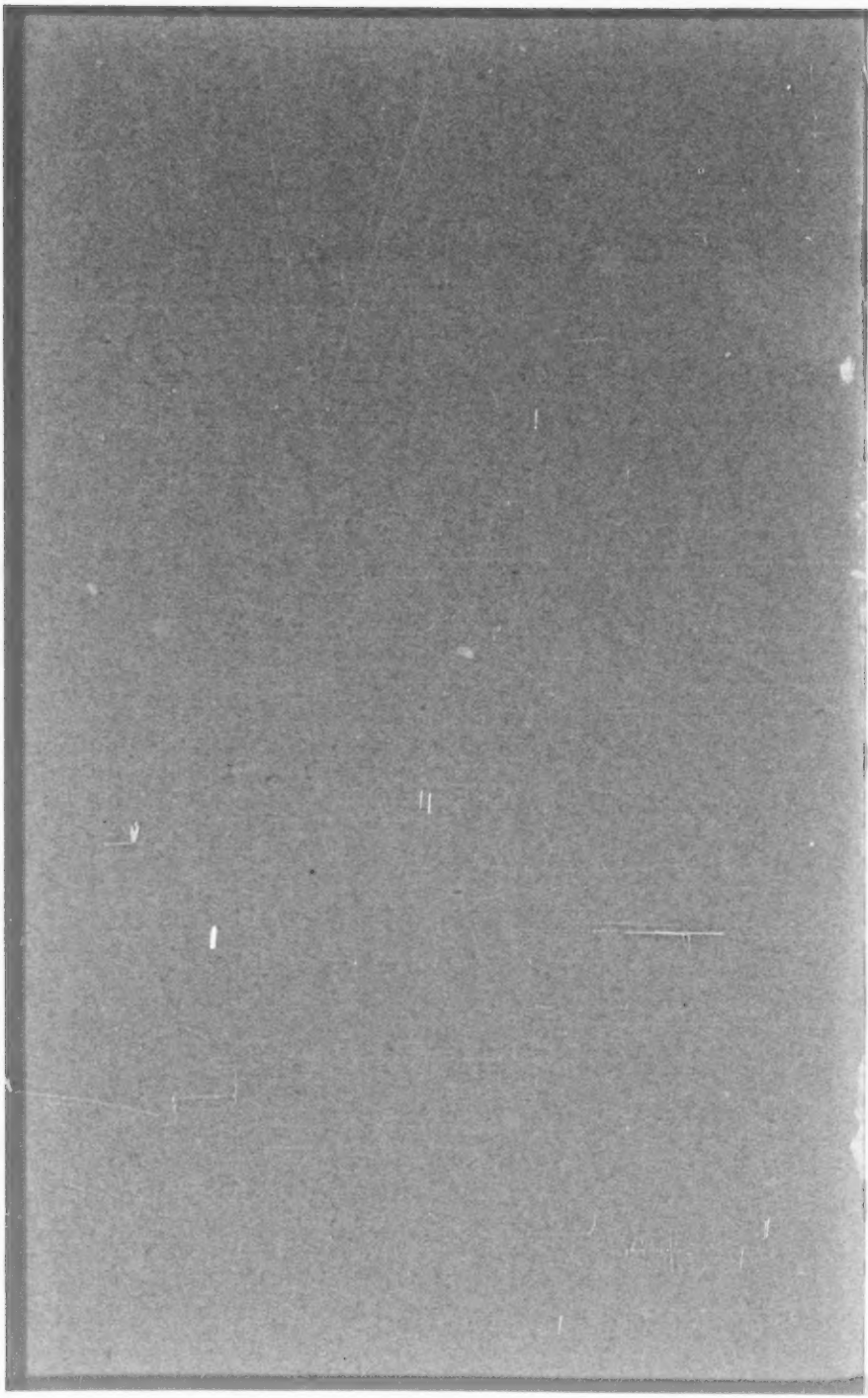

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When the case was submitted we had not seen the solicitor general's brief in its completed form, and therefore reserved the privilege, through his courtesy, of filing a brief in reply. We have now received the brief. We do not find that the solicitor general disputes the first three propositions submitted in our brief. He expressly concedes that Ballmann could not properly be committed for an offense not specified in the written charges of the grand jury, and he further concedes that those charges, so far as they relate to a book, were that Ballmann had failed "to produce the cash book *called for by the subpoena of April* 7th" (last page of solicitor general's brief). He has heretofore conceded that the subpoena of April 7th was confined to books and papers "showing transactions under the name of A. Smith and A. Johnson" (see pages 8 and 9 of our brief). It follows from

the admissions of the solicitor general, that Ballmann could not be committed without proof beyond a reasonable doubt that, on April 7, he had in his possession or under his control a cash book "showing transactions under the name of A. Smith and A. Johnson," and that he wilfully failed to produce it. No other charge was preferred against him.

Now, there is not a scintilla of evidence that Ballmann ever had a cash book "showing transactions under the name of A. Smith and A. Johnson." We suppose it will not be claimed that there is a presumption of law or of fact that any particular book contains "transactions under the name of A. Smith and A. Johnson," in the absence of evidence of its contents.

Lawrence Maxwell, Jr.,
Miller Outcalt,
Thomas F. Shay,
Counsel for the Plaintiff in Error.

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In the Supreme Court of the United States.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

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v.
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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF FOR THE UNITED STATES.

The brief upon this writ of error will be confined, mainly, to the discussion of those matters of fact and evidence not properly before the court on the habeas corpus appeal, and which were therefore not fully discussed in the Government briefs in that case. Little if anything will be added upon the constitutional questions.

Scope of the questions presented.

It is important to bear in mind the exact scope of the questions arising on this record. Ballmann was finally ordered to be committed (Rec. on habeas corpus appeal, p. 13, which is the record referred to throughout this brief), not for failing to produce all his books

and papers, in response to the general order of April 10, entered as of April 7 (Rec., p. 19), referred to in the first assignment of error, but for refusing to obey the order of April 8, 1905 (Rec., pp. 12–13), which required him to produce "the said cashbook and answer the questions set out in said charges of contempt." The charges referred to were those presented by the grand jury on April 8 (Rec., pp. 11–12), which alleged that Ballmann had wilfully failed and refused to produce "*a certain cashbook in use in his business*," as required by the subpœna served on him on April 7, and had also refused to answer the two questions therein set forth as to the reference of the folio numbers in the ledger which he did produce. The subpœna of April 7 commanded Ballmann "to bring cashbook, ledger, letter press copy books & all sheets showing transactions under the name of A. Smith & A. Johnson during months of Dec., 1904, & Jan. & Feb., 1905," and to appear and testify before the grand jury. (Rec., p. 43).

In his written answers before the grand jury in response to the order of April 8 Ballmann said (Rec., pp. 22, 46):

> I have not now, and neither at the time of nor at any time since the service of the first subpœna upon me in this matter have I had in my possession or under my custody or control the book referred to in the order of the court entered on April 8, 1905, or any book showing transactions under the name of A. Smith or A. Johnson, and am unable to produce the same.
>
> I decline to answer the questions contained in said order of April 8, 1905, on the ground

> that it might tend to criminate me, and in this connection I produce copy of a petition filed against me and others by Emanuel Oppenheimer in the Court of Common Pleas of Hamilton County, being case No. 126,824, and I state that there are many other actions of the same kind pending against me.

At the trial, his counsel said (Rec., p. 41):

> As to the book, we say to your honor we haven't got it. As to the questions, Mr. Ballmann requests me to place this in your honor's hands.

The following paper was then produced and offered in evidence (Rec., pp. 41, 42; Exhibit G, p. 43):

> As to the questions asked I refuse to answer, as they might tend to criminate me.

It is clear from these answers that, so far as "the book referred to in the order of the court of April 8, 1905," is concerned, no privilege or immunity under the Constitution or laws of the United States is set up or claimed, but the issue made is simply whether he had said book in his custody or under his control at that time, or at the time of the service of the subpœna on April 7, or at any time since such service. He certainly can not be permitted, after denying that the book referred to was in his possession or under his control, to stultify himself by saying, "The book is in my possession and under my control, but to compel me to produce it will expose me to a criminal prosecution for failing to comply with the order entered as of April 7," which he contends was unconstitutional. Yet this

seems now to be his position. (See brief for appellant on habeas corpus appeal, pp. 16–22.)

As to the cash book, then, the inquiry on this writ of error is limited to the points whether the evidence adduced warranted the District Court in finding that it was in his possession and under his control, and whether such evidence was admissible. No question of illegal search and seizure or compulsory self-incrimination under the Fourth and Fifth Amendments is presented.

It is only in regard to his refusal to answer the questions as to the folio references in the ledger that his constitutional immunity against being compelled to testify against himself was asserted. In his answers before the grand jury he referred, as giving color to this contention, to certain civil proceedings in an Ohio court based upon his alleged violation of the State laws against gambling. In the Government's supplemental brief on the habeas corpus appeal (page 13) it was stated that that matter was not before the District Court. This was too broad, since it was referred to in his answer before the grand jury. But it is substantially correct, because he abandoned this position at the trial and suggested perjury in having previously denied the existence of the cashbook as the sole basis of his privilege. (See opinion of Judge Thompson, Government's original brief on habeas corpus, p. 61.) The paper filed at the hearing (Exhibit G) contained no reference to the Oppenhimer case. (Rec., pp. 41, 43.) It also appears that he contended that his own bare state-

ment that an answer to the questions put would tend to criminate him was sufficient to entitle him to the constitutional immunity. (Rec., p. 42.) In this court on the habeas corpus appeal he has asserted all these claims, and he apparently reasserts them all in this case.

I.

AS TO THE QUESTIONS.

The nature and extent of the constitutional immunity in respect to the questions asked by the grand jury has been discussed at length in the Government briefs already on file. It is manifest from the authorities there cited—

(1) That it is for the court to determine, from the circumstances of the particular case, whether a direct answer to the question asked might criminate the witness.

(2) That perjury committed in the course of the same examination—which would be exposed by a direct answer to the question asked—is a necessary exception to the immunity claimed.

It is also clear that, aside from the matter of perjury in denying the existence of the cashbook, a direct answer to the questions asked will not in any way tend to incriminate Ballmann.

The first question was (Rec., p. 1):

> State what on account No. 140 sheet No. 1, on this big ledger now in use in your business, these figures under the word "folio," on the debit side of the account, to wit Nos. 349, 349, 349, 349, 349, and 351 refer to.

Of course the natural inference, from what we know the object of these questions to be, is that the numbers stated referred to a cashbook. But it is beyond any divination to see how the fact that Ballmann used a cashbook in his business could tend to criminate him in any way. It is possible, however, that the numbers refer to some other book, paper, or slip. But the result, so far as the incrimination of the witness is concerned, would be the same. It is equally lawful to use in one's business a slip, a piece of paper, or another book, as a cashbook.

The second question was (Rec., p. 2):

> Do not these figures, 349, in your handwriting, refer to the folios in your cashbook in use in your business in January, 1905?

Here there can be no question as to the answer. If direct, it must be "yes" or "no." If "yes," he has simply acknowledged that he has used a cashbook in his business. That mere fact alone would afford no evidence against him in a criminal proceeding for violating the State laws against gambling or any other statute, Federal or State, barring perjury. If the cashbook contained criminating evidence, he could doubtless resist its production in any such proceeding on that ground. But there is nothing criminal or suggestive of criminality in his using a cashbook in his business, unless he deliberately perjured himself at the outset before the grand jury and a truthful answer now would convict him. His immunity certainly can not extend that far.

In this case, it will be remembered, Ballmann did not refuse to produce the cashbook in question on the ground that it contained evidence that might criminate him, but rested his case on a denial that such a book had, to his knowledge, been used in his business, or that the book at the time of the service of the subpœna or since was in his possession or under his control.

II.

AS TO THE CASHBOOK.

The evidence adduced justified the District Court in finding that Ballmann had in his possession or under his control the cashbook in question.

The following is from the testimony of Foreman Dieterle (Rec., p. 27):

> Q. Mr. Dieterle, state whether or not on yesterday, in the investigation before the grand jury, Mr. Ballmann produced a cashbook which was called for by his subpœna.
>
> A. He did not.
>
> Q. Will you state whether or not, on this morning, before said grand jury, he produced said cashbook which he was called upon to produce in his subpœna?
>
> A. He did not.
>
> Q. Will you state what he said with reference to the cashbook being used in his business during the months of December, 1904, and January, and February, and March, and up to April 6, 1905?
>
> * * * * *
>
> A. The question was asked, and he said there was no such book to his knowledge.

In his written answer before the grand jury, in response to the order of April 8, 1905, Ballmann said (Rec., pp. 22, 46):

> I have not now, and neither at the time of nor at any time since the service of the first subpœna upon me in this matter have I had in my possession or under my control the book referred to in the order of the court entered on April 8, 1905, or any other book showing transactions under the name of A. Smith or A. Johnson, and am unable to produce the same.

At the trial his counsel said (Rec., p. 41):

> As to the cashbook, we say to your honor we haven't got it.

The evasive and contradictory character of these statements is apparent. An honest, straightforward man, with nothing to conceal, if questioned as to a cashbook in use in his business, would have answered, if such were the fact, that there was no such book, and stuck to that answer all the way through.

But here we have, first, a denial by Ballmann that there was such a book as that referred to in the subpœna of April 7, qualified, however, by the words "to his knowledge," followed by a statement that "the book referred to in the order of the court entered on April 8, 1905," that is, the book showing transactions under the name of A. Smith or A. Johnson, called for by the subpœna, was not then and had not at the time or since the service of the subpœna been in his possession or under his control—not that there was no such

cashbook, or that it had not been in his possession or under his control prior to the service of the subpœna.

A plainer acknowledgment of the existence of the book could hardly be expected from such a source.

The existence of the cashbook referred to in the subpœna having been thus confessed, it follows that it and the cashbook shown to exist by the undisputed testimony of his own employees were identical, since but one cashbook appears to have been used in his business.

Reluctant and evasive as their testimony was, it clearly shows that a cashbook had been used in Ballmann's business up to April 3 at least, a cashbook in which the daily transactions of the house were entered, and hence a cashbook which would show any transactions that might have been carried on under the name of A. Smith or A. Johnson. (Testimony of Clements, Kramer, and Hunt, Rec., pp. 28, 33, 38.) Clements, it is true, claimed that this particular cashbook was used by him personally; but he was Ballmann's bookkeeper (Rec., p. 32), and he admitted that the cashbook referred to was used in the conduct of Ballmann's business (Rec., p. 28). The right of Ballmann to control any book used in the conduct of his business will hardly be questioned. There can be no doubt that he knew of the existence of this particular book, and the evidence shows that he used it himself.

It will be observed that in response to the subpœna of April 7, directing him to bring cashbook, ledger, etc., showing transactions under the name of A. Smith

and A. Johnson, Ballmann produced the ledger in use in his business. Yet the command to produce the ledger was no more definite than the command to produce the cashbook. If the ledger did not show transactions under the name of A. Smith and A. Johnson, why was it produced, since he claims that he thought only books showing such transactions were desired; and if it did show such transactions is it not a fair inference that the cashbook used in his business also did, the ledger being ordinarily posted from the cashbook, or else that he produced the ledger because it did not show such transactions and withheld the cashbook because it did? At any rate, he knew, from the question asked by the grand jury as to the cashbook in use in his business, and from the evidence given of the existence of such a cashbook, that that was the book he was expected to produce, and the production of which, whether it showed transactions under the name of A. Smith and A. Johnson or not, would satisfy the order of the court.

The only persons besides Ballmann who personally knew what the cashbook used in his business contained were Clements and Hunt. The hostile, reluctant, and evasive character of their testimony is apparent. Clements, who claimed the book to be his own, when questioned as to what transactions appeared upon it during the period in question, said that he could not remember. (Rec., p. 31.) Being pressed a little further, he made the general statement that some people paid him money and he credited it, and that when he paid some people he put it on then; but

didn't always fix up the cash; sometimes it was on slips. (Rec., p. 31.)

It is manifest that nothing would have been gained by a direct question as to whether the cashbook in question showed transactions under the name of A. Smith or A. Johnson.

Proceedings before the grand jury not improperly disclosed.

No exception appears to have been taken to the admission of testimony as to what took place before the grand jury upon the ground that such proceedings were secret and not subject to be gone into in this way. Counsel seem to have recognized the well-settled rule that the proceedings of a grand jury may be disclosed, either by a member thereof or any other person present, whenever it becomes necessary to the due administration of justice.

Wharton's Crim. Ev. (8th ed.), sec. 510, and cases cited in note 2.

1 Bishop on Crim. Proc. (1st ed.), sec. 729, and cases cited in note 4.

9 A. & E. Ency. of Law (1st ed.), p. 17, and cases cited in note 7.

United States v. *Reed* (27 Fed. Cas., 727, 738).
United States v. *Farrington* (5 Fed. Rep., 343).
United States v. *Terry* (39 Fed. Rep., 355).
United States v. *Cobban* (127 Fed. Rep., 713).

In *Counselman* v. *Hitchcock* (142 U. S., 547) there was likewise no objection to the disclosure of the proceedings before the grand jury for the purposes of the contempt case.

The adverse witnesses properly examined.

Error is assigned in allowing the United States attorney to pursue the method he used in examining Witnesses Clements, Hunt, and Kramer. (Eleventh assignment of error, *k*.)

These witnesses were manifestly hostile and adverse, and their testimony, in view of their former statements before the grand jury, in some respects surprising. The method of examination pursued was absolutely necessary to elicit the truth, and moreover was in strict accord with the established practice in Ohio, and is sustainable on principle and authority.

The rule in Ohio was finally established in *Hurley* v. *The State* (46 Ohio St., 320). In that case a witness upon a murder trial testified in some respects differently from what he said at the coroner's inquest and before the grand jury. He was examined by the prosecution as to his statements upon the two former occasions, and having denied making certain statements read to him from the notes of his testimony taken down by the coroner's clerk, the State called the clerk as a witness for the purpose of contradicting him.

The Supreme Court of Ohio held that it was permissible to examine the witness as to his former statements before the grand jury and at the coroner's inquest, and for this purpose his previous declarations might be repeated to him, and he might be called upon to say whether they were made by him; but that if he denied having made such statements, or his answer was

ambiguous concerning them, it was not competent for the party calling him to prove them by other witnesses.

Upon the first proposition, the court said (pp. 322–323):

> It is a well-established rule of evidence that a party is not concluded by the unfavorable testimony of his own witness, but may prove his case by other evidence. He is not precluded from proving any fact relevant to the issue by any competent evidence, though it be a direct contradiction of the testimony of a former witness called by him. And generally, where a witness is an unwilling one, or hostile to the party calling him, or stands in a situation which makes him necessarily adverse to such party, his examination in chief may be allowed to assume something of the form and character of cross-examination, at least to the extent of permitting leading questions to be put to him. But a further question arises in this case, and it is whether the party calling a witness may, upon being taken by surprise by his unexpected adverse testimony, be allowed to examine him concerning declarations or statements previously made by him which are inconsistent with his testimony. That such previous declarations can not thus be made substantive evidence of the facts stated is conceded, nor can such examination be permitted merely to impeach the witness.
>
> But, if the testimony of the witness is material to the cause, it is of importance that it be true. It not unfrequently happens that a witness, under the embarrassment of an examina-

tion, forgets or omits to state facts within his knowledge, or is disinclined to disclose fully and definitely what he knows. Ample opportunity should be afforded for the correction of such mistakes and omissions, and for eliciting fully the facts that are material to the issue. The recollection of the witness may be so refreshed by directing his attention to a former conversation or declaration as to cause him promptly to correct his testimony or explain the apparent inconsistency. For this purpose such examination may afford valuable aid in judicial investigation; and, if it be competent at all for that purpose, the reason for admitting it would seem to require that the examination should be allowed to extend so far as to permit the former statements to be repeated to the witness and inquiry to be made of him concerning them; for the repetition of the statement itself, referring to the circumstances of its utterance, would be the most likely means of awakening the recollection of the witness, enabling him to recall the facts, satisfy him of his mistake, and induce a correction or explanation. *Or, if the witness be a perverse or false one, such examination may serve to probe his conscience, and move him to relent and speak the truth.*

We think it a reasonable rule that a party who calls a witness, and is taken by surprise by his unexpected adverse testimony, may be permitted to interrogate him in respect to declarations and statements previously made by him which are inconsistent with his testimony, for the purpose of refreshing his recol-

> lection and inducing him to correct his testimony, or explain his apparent inconsistency, and for such purpose his previous declarations may be repeated to him; and he may be called upon to say whether they were made by him. Well-considered cases and text-books of authority recognize the rule as stated.

This case was followed in *Mustill* v. *Thornton* (22 Ohio Cir. Ct., 608), where it was held competent for a party to question his own unwilling witness on reexamination for the purpose of contradicting the testimony given by him on cross-examination. "Such examination," the court said, in stating their agreement with *Hurley* v. *State*, "affords valuable aid in judicial investigations, and [we] deem it competent for the purpose of proving the conscience of a witness, refreshing his recollection, and giving him an opportunity of correcting his testimony, and of explaining his apparent inconsistency."

In *St. Clair* v. *United States* (154 U. S., 134, 150), this court said:

> An exception was taken to the mode in which the district attorney was permitted to examine one of the witnesses introduced by the Government. The attorney announced that the answers of the witness had taken him by surprise and asked that he be permitted to put leading questions to him. This was allowed, and we can not say that the court in so ruling committed error. In such matters much must be left to the sound discretion of the trial judge who sees the witness and can therefore determine in

the interest of truth and justice whether the circumstances justify leading questions to be propounded to a witness by the party producing him. In *Bastin* v. *Carew* (Ryan & Mood., 127), Lord Chief Justice Abbott well said that "in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted in order best to answer the purposes of justice." The rule is correctly indicated by Greenleaf, when he says: "But the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify, or that the witness has recently been brought under the influence of the other party and has deceived the party calling him. For, it is said, that this course is necessary for his protection against the contrivance of an artful witness, and that the danger of its being regarded by the jury as substantive evidence is no greater in such cases than it is where the contradictory allegations are proved by the adverse party." (1 Greenl., Ev., 12th ed., sec. 444; Taylor on Ev., 6th ed., sec. 1262A; *Regina* v. *Chapman*, 8 Car. & P., 558, 559; *Regina* v. *Ball*, 8 Car. & P., 745; *Clarke* v. *Saffrey*, Ryan & Mood., 126.)

The history of the rule forbidding the impeachment of one's own witness, together with the reasons *pro* and *con*, are fully set forth in Wigmore on Evidence, Volume II, sections 896–906. It is apparent from the authorities there cited that, whatever the ancient rule, the

modern tendency is to uphold such questions as are necessary to elicit the truth, even if they involve an apparent contradiction of one's own witness. See also cases cited in 3 Taylor on Evidence (9th ed.) 978.

It will be observed that the Government receded from its attempt to impeach the witness Clements by recalling Foreman Dieterle to testify as to what he said before the grand jury. (Rec., 41.) The examination of Ballmann's employees was therefore strictly in accordance with the Ohio rule as laid down in *Hurley* v. *State* (supra). They were simply questioned as to what they had said before the grand jury, and their answers accepted for what they were worth.

The proceedings below constituted due process of law.

The eighth and ninth assignments of error raise the question of due process of law, alleging that the court refused defendant a reasonable opportunity to secure counsel and prepare for a hearing, and required him to proceed without a specific information.

The record shows (pp. 25, 26, 41) that the court allowed defendant the benefit of counsel and also an opportunity to make his defense, but refused to accede to his requests for delay. This procedure was perfectly proper.

Ex parte Terry, 128 U. S., 289, 307.
Savin, Petitioner, 131 U. S., 267, 277.

Under the authority of the above cases, the court might have adjudged Ballmann in contempt without further proof or examination, upon the report of the

grand jury of his noncompliance with its order, as the refusal to testify before that body was a contempt committed in the face or under the eye of the court, the grand jury being a part of the court. (Bailey on Jurisdiction, 350.)

The court, however, did not proceed in this summary manner, but gave Ballmann abundant opportunity to be heard.

He was fully advised by the report of the grand jury as to the nature of the charge against him, to wit, disobedience of the order of April 8. He was not entitled to trial by jury (*In re Debs*, 158 U. S., 595, 596), and consequently to none of the formalities incident thereto. In affording him opportunity to be heard, the court went as far as was required. (*Savin, Petitioner*, 131 U. S., 278, citing upon this point *Randall* v. *Brigham*, 7 Wall., 523, 540.)

Ballmann was not entitled to have his answers taken as conclusive, even assuming that they were properly authenticated by oath. It is for the court to determine whether such answers are sufficient.

> *United States* v. *Debs* (64 Fed. Rep., 724, 738) and authorities cited.
>
> *United States* v. *Sweeney* (95 Fed. Rep., 434, 447).

Nor was he entitled to the benefit of section 860, Revised Statutes, in respect to the ledger which he voluntarily produced or statements which he voluntarily made.

> *Tucker* v. *United States* (151 U. S., 164).

In response to a subpœna to produce books, papers, etc., the witness must claim his privilege, or else his compliance with the subpœna will be regarded as voluntary.

United States v. *Kimball* (117 Fed. Rep., 156).

The judgment and order of commitment were fully authorized by law.

The tenth assignment of error alleges that the judgment and order of commitment are illegal and void, "because they are indefinite and uncertain, and because the punishment inflicted is indefinite and in violation of the Constitution and laws of the United States."

The final judgment, entered April 10 (Rec., pp. 13, 24), was that Ballmann be confined and imprisoned in the county jail, "in accordance with the former order of this court." The "former order" was that made April 8, which directed that "said John W. Ballmann produce the said cashbook and answer the questions set out in said charges of contempt at 12 o'clock noon, Monday, April 10, 1905, before said grand jury, and in default thereof that he be committed to and confined within the jail of Miami County, Ohio, until he complies with the order of this court or is discharged by due process of law." (Rec., pp. 12–13.)

The commitment directs "that the said John W. Ballmann be imprisoned in the jail of Miami County, Ohio, until he answers the questions and produces the book as he was required." (Rec., pp. 24–25.)

The authority of a court of record to coerce compliance with its orders by committing the contemnor until

he submits or is discharged by further order of the court is well settled.

Tinsley v. *Anderson* (171 U. S., 107–108).
In re Allen (13 Blatch., 271; Fed. Cas., No. 208).
Fisher v. *Hayes* (6 Fed., 74).
Rapalje on Contempt, 179.
Bailey on Jurisdiction, 323.
7 A. & E. Ency. of Law (2d ed.), 68, and cases cited.

In the *Case of Yates* (4 Johns., 318), where the order was that the contemnor be "committed to jail, there to remain until the further order of the court," Chancellor Kent said (p. 375):

> If the time should be definite in the sentence, the court could not alter it, even upon the submission of the party; and it would operate rigorously upon him. The courts would feel obliged to commit for a time adequate to make due reparation for the contempt, without any submission. It is the established course, in the courts of law and equity, and in the legislature, to receive the submission of the party, whenever he is ready to offer it, and, on reasonable satisfaction made, to discharge him. The party offending ought to submit, and the form of the order is the most effectual way to ensure it. There is no such thing as the abuse of this power in modern times. The case probably is not to be found. An alarm can not be excited at its existence, in the extent now laid down. It is given to the courts only for their preservation, in order to enable them to repel insults, to protect suitors, to support their process, and to be an asylum from violence and oppression.

Where an offender has been committed until he submits, or until further order of the court, or until he is discharged by due process of law, his case is manifestly still under the jurisdiction and control of the court; consequently the court may enter any further order in the premises which the necessities of the case and the due administration of justice may require. If the situation has changed so that it would be impossible for him to comply with the mandate of the court, he would doubtless be entitled either to be discharged from imprisonment or to have his sentence made fixed and determinate. But where, as here, his commitment has been suspended pending his appeals, it would be manifestly absurd to say that, because compliance may have become impossible by reason of change of conditions—here, the expiration of the grand jury—he is entitled to go free of all punishment. In such case, the law would be justly a subject of derision and contempt.

In *In re Nevitt* (117 Fed. Rep., 448), the Circuit Court of Appeals for the Eighth Circuit asserted the plenary authority of the courts of the United States to enforce obedience to their orders by fine or commitment, and, for the purpose of securing the rights of suitors, to amend its judgment as the situation may require. If this may be done in the case of private litigants, *a fortiori* should it be allowable where, as here, the rights of the public are concerned. It is a necessary consequence of the indeterminate character of coercive judgments in contempt cases.

The findings of fact of the trial court are conclusive.

Davis v. *Schwartz* (155 U. S., 636, 637).

Grayson v. *Lynch* (163 U. S., 472, 473).

Plaintiff in error apparently recognizes the well-settled rule that an appellate court will not on error inquire into the weight and sufficiency of the evidence, but will accept the findings of fact made by the court below if there was any competent evidence to support them.

That there was competent evidence to support the findings of the District Court has been shown. Ballmann, in his contradictory and evasive answers, practically admitted the existence of the cashbook called for by the subpœna. The testimony of his own employees showed that but one cashbook was used in his business, hence the conclusion was inevitable that it was the one called for by the subpœna. The book was used in the conduct of his business, therefore it had been in his possession and under his control, and presumably was still in his possession and under his control, since its absence was in no way accounted for.

The fact of the existence of the cashbook being established, as well as the fact that it was in his possession or under his control, there can be no question that his refusal to produce it as directed by the court amounted in law to contempt. So also as to his refusal to answer the questions, if they were not privileged.

Ballmann was tried and convicted upon the charges preferred against him, and none other.

In the brief for plaintiff in error, which I have just received, reference is made to certain cases to the effect that one charged with contempt of court can not be punished for some other offense not specified in the charges against him. (*In re Reese*, 107 Fed. Rep., 942; *Parkhurst* v. *Kinsman*, 2 Blatchf., 76; Fed. Cas. No. 10759.) Admitting the principle, I fail to see its application. Ballmann was charged with refusing to answer certain questions propounded to him by the grand jury and with failing to produce the cashbook called for by the subpœna of April 7, and he was tried and convicted upon those charges and none other. He refused to answer the questions, and he failed to produce the cashbook. The court found as a fact, from the evidence adduced and his own statements, that *the* cashbook called for by the subpœna existed and was in his possession and control. To say that the evidence did not warrant this conclusion is one thing; but to say that he was tried and convicted for an offense not specifically charged against him is a very different thing and without foundation in this record.

There being no error in the record, the judgment of the District Court should be affirmed.

HENRY M. HOYT,
Solicitor-General.

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FILE COPY.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOHN W. BALLMANN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 308.

REPLY BRIEF FOR THE UNITED STATES.

In their brief in reply, counsel for plaintiff in error lay great stress upon the fact that I have conceded that Ballmann could not properly be committed for an offense not specified in the written charges of the grand jury, and that those charges, so far as they related to the book, were that Ballmann had failed "to produce the cashbook called for by the subpœna of April 7."

I am perfectly willing to stand or fall upon the proposition that Ballmann contemptuously failed to produce the cashbook called for by the subpœna. The subpœna, however, is open to two constructions: (1) That it calls for a cashbook "showing transactions under the name of A. Smith and A. Johnson, during the months of December, 1904, and January and February, 1905."

(2) That it simply calls for the cashbook in use in his business.

Assuming that the cashbook called for by the subpœna was one showing transactions under the name of A. Smith and A. Johnson, the existence of such a book is acknowledged by his various answers, evasive as they are. His defense, according to his written answer to the grand jury and the statement of his counsel at the trial, is not that there never was such a book, but that he did not have it at the time of the service of the subpœna or since. Now, as the evidence shows that there was but one cashbook in use in his business during the period in question, it is a necessary inference that that was the book to which he referred. And as the book referred to was used in the conduct of his business, his mere statement that it was not at the time of the service of the subpœna or since in his possession or under his control was clearly insufficient. The right of every man to control all books of account used in the conduct of his business can not be questioned. If exceptional circumstances exist, which would excuse or account for their nonproduction, they must be shown.

If the other view be taken, namely, that the subpœna simply called for the cashbook in use in his business, he has no ground whatever to stand upon. The uncontradicted evidence shows that there was such a book.

The subpœna is clearly susceptible of this latter construction. It calls for "cashbook, ledger, letterpress copy books, and all sheets showing transactions under the name of A. Smith and A. Johnson during

months of December, 1904, and January and February, 1905." The words "showing transactions under the name of A. Smith and A. Johnson," etc., may very properly be limited to the word "sheets," the object of the subpœna being to make him produce everything that would show such transactions, so that if perchance he did not keep those accounts in his regular books—the cashbook and ledger—but upon separate sheets, he would be obliged to produce them.

The view that the subpœna merely called for the cashbook in use in his business was ~~perhaps~~ doubtless that upon which the court below proceeded. That it was his own understanding of the subpœna may be inferred from the fact that in response thereto he produced the ledger in use in his business, which apparently did not show any accounts under the names of A. Smith or A. Johnson. If, however, it did show such transactions, then it is a fair inference that the cashbook used in his business also did, since the ledger is ordinarily posted from the cashbook.

It is so manifest that Ballmann's defense is only a technical quibble, that I fear I am unduly imposing upon the patience of the court in combatting it at length. The court will also observe that undue stress has been laid by counsel for plaintiff in error upon the cashbook phase of this case. The refusal to answer the questions is equally important.

HENRY M. HOYT,
Solicitor-General.

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Supreme Court of the United States.

Nos. 240 and 308.—October Term, 1905.

No. 240. John W. Ballmann, Appellant, *vs* Vivian J. Fagin, United States Marshal for the Southern District of Ohio. } Appeal from the Circuit Court of the United States for the Southern District of Ohio.

No. 308. John W. Ballmann, Plaintiff in Error, *vs.* The United States. } In Error to the District Court of the United States for the Southern District of Ohio.

[January 2, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

One of these cases, is a writ of error issued by this Court to the United States District Court upon a judgment committing the plaintiff in error for contempt, the other an appeal from the Circuit Court for the same district upon a judgment denying the writ of *habeas corpus*, which was applied for on the ground that the same commitment was void.

The case so far as material to our decision, is as follows: On April 7, 1905, Ballmann was served with a subpœna to appear before the grand jury and to bring with him "cash book, ledger, letter press copy book, and all sheets showing transactions under the name of A. Smith and A. Johnson during the months of December, 1904, and January and February, 1905." He appeared before the grand jury, and on the same day the grand jury reported his failure to produce the books and papers called for by the subpœna. The Court entered an order as of that day, April 7, that he should produce all books and papers pertaining to his business. On April 8 the grand jury filed charges of contempt against him, in that "being required by said subpœna to produce a certain cash book in use in his business" he refused to do so, and also that he refused to answer the following questions: (*a*) "State what on account No. 140, sheet # 1, on this big ledger now in use in your business, these figures under the word 'folio,' on the debit side of the account, to wit: No. 349, 349, 349, 349, 349, and 351 refer to?" (*b*) "Do not these figures 349 in your handwriting, on account No. 140, refer to the folios in your cash book in use in your business in January, 1905?" On the same day, April 8, the Court, after hearing evidence, ordered Ballmann to produce the said cash book and to answer the above questions at noon on April 10, or to be committed to jail until compliance or discharge by due process of law.

On April 10 Ballmann appeared and made the following answers: "I have not now, and neither at the time of nor at any time since the service of the first subpoena upon me in this matter have I had in my possession or under my custody or control the book referred to in the order of the Court entered on April 8, 1905, or any book showing transactions under the names of A. Smith or A. Johnson, and am unable to produce the same."—"I decline to answer the questions contained in said order of April 8, 1905, on the ground that it might tend to criminate me and in this connection I produce copy of a petition filed against me and others by Emanuel Oppenheimer in the court of common pleas of Hamilton county, being case No. 126,824, and I state that there are many other actions of the same kind pending against me." The petition referred to charged Ballmann and others with conducting a scheme of gambling known as a "bucket shop," criminal conduct under the laws of Ohio, the State where the case was being tried.

Thereupon, upon the same day, the Court, without hearing further evidence, reciting its former order and Ballmann's failure to comply with it, ordered him to be imprisoned in accordance with the same. Afterwards a bill of exceptions was allowed, which set forth the proceedings of April 8. It appears that on that day the foreman of the grand jury testified that Ballmann was inquired of with reference to the cash book, and said that there was no such book. (It is fair to read the statement as meaning the same as his formal answer on the 10th and no more.) Other witnesses gave evidence tending to prove the existence of a cash book, although not, or at least not except by very remote inference, a cash book showing transactions under the name of A. Smith or A. Johnson. It also appears that Ballmann's counsel said to the court, "As to the book, we say to your honor that we haven't got it" and also handed the court a paper from Ballmann, reading, "As to the questions asked, I refuse to answer, as they might tend to criminate me."

It appears to us, and it hardly is denied, that the charge of contempt in failing to produce a book, is confined, as it was taken by Ballmann's answer to be confined, to a failure to produce a cash book showing transactions under the name A. Smith or A. Johnson. We assume that the commitment was upon the charge and the order of April 8, not upon the order entered as of April 7. Upon that assumption it might be enough to say that the Court was not warranted in finding Ballmann guilty by any evidence which it had before it. There was nothing to show that his answer was not literally true. *In re Watts & Sachs*, 190 U. S. 1, 35, 36. But we need not stop there. Suppose that Ballmann had in his possession a book, which he was privileged from producing and which he wished not to produce. Suppose, also, that he were summoned as he was in this case, and that the book did not show the dealings described, he could not be

criticized very severely for avoiding, if possible, the discrediting claim of privilege, by an answer literally exact. If then he should be asked in general terms to produce his cash book he would not be debarred from pleading his privilege by what he had said before. And without any inclination to enlarge a witness' rights beyond the settled requirements of law, we think that the privilege might extend to any question, the manifest object of which was to prove possession or control as a preliminary to calling for the book.

To determine whether the case which we have supposed is the case at bar we must consider whether we can see reasonable grounds for believing that the book was privileged, or that it was not—it does not matter for our purposes in which form the question is put. The subject under investigation, according to the Government's statement, was the criminal liability of some employe of a national bank from the vaults of which a large amount of cash had disappeared. The book very possibly may have disclosed dealings with the person or persons naturally suspected, and, especially in view of the charges that Ballmann kept a "bucket shop," dealings of a nature likely to lead to a charge that Ballmann was an abettor of the guilty man. If he was, he was guilty of a misdemeanor under Rev. Stat. § 5209, and no more bound to produce the book than to give testimony to the facts which it disclosed. *Boyd* v. *United States*, 116 U. S. 616. *Counselman* v. *Hitchcock*, 142 U. S. 547.

Not impossibly Ballmann took this aspect of the matter for granted, as one which would be perceived by the Court without his disagreeably emphasizing his own fears. But he did call attention to another less likely to be known. As we have said, he set forth that there were many proceedings on foot against him as party to a "bucket shop," and so subject to the criminal law of the State in which the grand jury was sitting. According to *United States* v. *Saline Bank*, 1 Peters, 100, he was exonerated from disclosures which would have exposed him to the penalties of the State law. See *Jack* v. *Kansas*, decided this term. One way or the other we are of opinion that Ballmann could not be required to produce his cash book if he set up that it would tend to criminate him.

But it is said that he did not set it up, but on the contrary denied the existence of the book. We are not of that opinion. We think that he was giving an answer which, whether too sharp or not, might be true even if he had a cash book within his control. His denial was limited explicitly and with no disguise in the form of statement to a cash book showing transactions under the name A. Smith or A. Johnson. It called attention to the limit by its form. And when thereupon he was asked questions, the manifest meaning of which was to fasten upon him an admission that there was a cash book, he at once declined to answer. Of course it may be that he declined because he knew that further answers would disclose the falsity

of his first denial. But the natural explanation of the claim of privilege is that a cash book existed, that Ballmann knew it, and that he believed that if produced it would criminate him in one of the two ways which we have explained. Nothing more need be said about the questions as distinguished from the production of the book. See *Counselman* v. *Hitchcock*, 142 U. S. 547.

We are aware that the Courts below came to their conclusions upon the assumption that Ballman denied generally the possession of a cash book, and that he was before the Court for disobedience to an order to produce it. It may be that he now escapes liability as much by luck as by desert. But he is entitled to demand a judgment according to the record, and we are of opinion that on the record fairly construed the judgment of the District Court should be reversed. This decision makes any other than formal action upon the *habeas corpus* unnecessary, and therefore the judgment of the Circuit Court may be affirmed for the purpose of ending the case.

Judgment of the District Court reversed.
Judgment of the Circuit Court affirmed.

Mr. Justice HARLAN and Mr. Justice MCKENNA dissent.

True copy.

Test:

Clerk Supreme Court, U. S.